88-1856

No. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1989

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,
Petitioner

v.

NICK MARTINOLICH, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

WILLIAM J. GUSTE, JR.
Attorney General

PATSY JO McDOWELL, Counsel of Record
DAVID NEILSON CRAWFORD
Assistant Attorneys General

LOUISIANA DEPARTMENT OF JUSTICE
Division of Risk Litigation
Post Office Box 94095
Baton Rouge, LA 70804-9095
Telephone: (504) 342-8495

QUESTIONS PRESENTED

This case involves the following federal question:

Under the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17 (Sec. 132), 101 Stat. 132-261 at 170, 23 U.S.C. § 409, will the information compiled under this statute for the purpose of identifying, evaluating and planning the safety enhancement of potential accident sites, hazardous roadway conditions and railway-highway crossings be subject to pretrial discovery under State discovery statutes even though Sec. 409 of 23 U.S.C. states that this information "shall not be admitted into evidence in Federal or State court *or considered for other purposes* in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data"? (emphasis supplied)

Or stated another way: In actions for damages in State or Federal Court where federally funded highway projects are involved, is the information which has been compiled under 23 U.S.C. § 409 for the purpose of identifying, evaluating and planning the safety enhancement of potential accident sites, hazardous roadway and bridge conditions, and railway-highway crossings, subject to discovery under the discovery statutes of each of the 50 United States even though 23 U.S.C. § 409 mandates that this information "shall not be admitted into evidence in Federal or State court *or considered for other purposes* in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data"? (emphasis supplied)

LIST OF PARTIES

1. Nick Martinolich and/or Nick Martinolich, Inc. represented by Risley Triche, Esq., Post Office Drawer 339, Napoleonville, Louisiana 70390.

2. Southern Pacific Transportation Co., Robert Fiegel and Daniel Underwood, represented by John G. Gomila, Jr., Esq., Place St. Charles, 201 St. Charles Avenue, New Orleans, Louisiana 70170.

3. American Mutual Liability Insurance Co., as insurer for Nick Martinolich and/or Nick Martinolich, Inc., and Martinolich's employee, Russell Benoit, III, represented by C. Kelly Lightfoot, Esq., 3121 21st Street, Post Office Box 8288, Metairie, Louisiana 70011-8288.

4. State of Louisiana through the Department of Transportation and Development, represented by William J. Guste, Jr., Attorney General, State of Louisiana; Patsy Jo McDowell, counsel of record, and David Neilson Crawford, Assistant Attorneys General, Louisiana Department of Justice, Division of Risk Litigation, Post Office Box 94095, Baton Rouge, Louisiana 70804-9095.

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STATUTES:

Public Law 100-17, 101 Stat. 132-261, 23 U.S.C. 101 et seq., the pertinent portions of which are as follows:

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October Term, 1989

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,
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NICK MARTINOLICH, ET AL.,
Respondents

OPINIONS BELOW

The denial of writs by the Louisiana Supreme Court on January 6, 1989, (Appendix, infra 41a) is reported at 535 So.2d 745 (1989). (Time of entry not given.)

The opinion of the First Circuit Court of Appeal of the State of Louisiana on October 12, 1988, (Appendix, infra 27a) is reported at 532 So.2d 435 (1988). (Time of entry not given.)

The Judgment of the Louisiana 17th Judicial District Court (in consolidated suits numbered 44698 and 46788) (Appendix, infra 25a) is not reported.

JURISDICTION

The opinion of the First Circuit Court of Appeal of the State of Louisiana entered on October 12, 1988, (Appendix, infra 27a) is reported at 532 So.2d 435 (1988).

The denial of writs by the Louisiana Supreme Court (Appendix, infra 41a) was entered January 6, 1989, and is reported at 535 So.2d 745 (1989).

No rehearing is permitted under Louisiana law.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. 1257(3).

The denial of writs by the Louisiana Supreme Court was the final judgment by the highest court in Louisiana.

The validity of a statute of the United States (23 U.S.C. 409) is drawn in question, and the validity of statutes of the State of Louisiana (L.S.A.-C.C.P. 1422-1425) are drawn in question on their being repugnant to the law of the United States (23 U.S.C. 409).

Additionally, a privilege is claimed by the State of Louisiana through the Department of Transportation and Development under a statute of the United States (23 U.S.C. 409), which privilege was repudiated by the Louisiana Court of Appeal, First Circuit, in 532 So.2d 435 (1988).

Further, the issue in this case falls under Rule 17.1.(c) of the Rules of the United States Supreme Court. The Louisiana state courts have "decided an important question of federal law which has not been, but should be, settled by this Court . . ."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provision

U.S. Constitution, Art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the

Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statutes

23 U.S.C. § 130. Railway-highway crossings

(a) Except as provided in subsection (d) of section 120 of this title and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, except as provided in subsection (d) of section 120 of this title and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so de-

termined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State highway department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects.—Each State shall conduct and systematically maintain a survey of all

highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices.—At least ½ of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment.—Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States. The Federal share payable on account of any project financed with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report.—Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treat-

ments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway crossings program.

(h) Use of funds for matching.—Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

23 U.S.C. § 144. Highway bridge replacement and rehabilitation program

[See Appendix, page 43a]

23 U.S.C. § 152. Hazard elimination program

[See Appendix, page 53a]

23 U.S.C. § 409. Admission as evidence of certain reports and surveys

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144. and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

(Added Pub.L. 100-17, Title I, § 132(a), Apr. 2, 1987, 101 Stat. 170.)

28 U.S.C. § 1257(a). State courts; appeal; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

L.S.A.-C.C.P. Arts. 1422-1425

[See Appendix, page 57a]

STATEMENT OF THE CASE

The Louisiana Court of Appeal, First Circuit, substantially stated the facts as follows:

> "These consolidated cases stem from a collision which occurred on November 1, 1980, between a train owned by the Southern Pacific Transportation Company (Southern Pacific) and a sugar cane truck owned by Nick Martinolich and operated by Russell Benoit, his employee. The collision occurred in Lafourche Parish, Louisiana, at a point where the Southern Pacific railroad tracks traverse Louisiana Highway 3185.
>
> "Southern Pacific filed suit for its damages against Martinolich, Benoit, and American Mutual Insurance Company. These defendants brought a third party demand against the State of Louisiana, Department of Transportation and Development (DOTD). Martinolich also sued Southern Pacific, DOTD, Robert Fiegel, and Daniel Underwood. In that suit Southern Pacific, Fiegel, and Underwood filed a third party demand against DOTD.
>
> "As pretrial discovery progressed, respective counsel for Martinolich and Southern Pacific deposed certain DOTD employees. During the course of the deposition of Joseph H. Wax, Deputy Undersecretary for DOTD, Wax was asked if a Mike Morgan would be the individual best able to discuss the Priority Rating System used to determine which crossings were most in need of warning devices. Counsel for DOTD objected to the question, citing 23 U.S.C. § 409 as authority. After some dialogue between counsel, the witness did answer and stated that Morgan would be the individual to answer questions about priority listings. The witness was then asked if Morgan would have had that knowledge in

1979 and 1980. Counsel for DOTD then stated that she would object to any other questions that pertained to a priority list on updating railroad crossings. After additional dialogue between counsel, questioning of Wax continued until he was asked, "Who makes the decision as to whether or not safety devices or additional safety devices, such as lights and the like, are needed at a particular crossing?" Counsel for DOTD again objected, citing 23 U.S.C. § 409. The deposition was terminated. Martinolich and Southern Pacific filed a Motion to Compel. The trial court denied the Motion and ruled that '23 U.S.C. Section 409 creates a privilege as to all information collected pursuant to the federal programs covered by this statute.'

"Counsel then applied for writs of prohibition, certiorari, mandamus, and review to this court. We granted a writ of certiorari and ordered briefs and oral argument because of our concern over the correctness of the trial court's interlocutory finding that 23 U.S.C. § 409 created a privilege as to all information collected pursuant to the federal programs covered by the statute."

On October 12, 1988, the First Circuit reversed the district court and held that the documents privileged under Sec. 409 do not exist for the finder of fact, i.e., the judge, and thus all information privileged under Section 409 is subject to discovery under the Louisiana discovery statutes, LSA-C.C.P. Arts. 1422-1425. (532 So.2d 435, 1988)

The State of Louisiana through the Department of Transportation and Development took writs to the Louisiana Supreme Court, which writs were denied in 535 So.2d 745 on January 6, 1989.

This petition for Writ of Certiorari to the Louisiana Court of Appeal, First Circuit, is being brought under 28 U.S.C. 1257(a).

This case is stayed in the state district court pending the final disposition of the questions herein presented.

ARGUMENT

According to the legislative history of Public Law 100-17, Congress enacted the Surface Transportation and Uniform Relocation Assistance Act of 1987 to provide authorizations for the Federal-Aid highway program for fiscal years 1987 through 1990 for all 50 states, the District of Columbia, Puerto Rico, and the Territories. The Act provided $52.3 billion in new authorizations for the highway program from the Highway Account of the Highway Trust Fund over the following four years.

1986 marked the 30th anniversary of the creation of the Highway Trust Fund and the beginning of the National System of Interstate and Defense Highways. The funds authorized by this Act, Pub. L. 100-17, 101 Stat. 132-261, 23 U.S.C. 101 et seq., would enable the completion of the Interstate System by 1990 and assure to the States as much flexibility as possible in spending available funds on Bridge, Secondary, Urban, Safety, Minimum Allocation, Interstate Substitution, Federal Lands, and Emergency Relief programs.

Under Section 132 of the Act (23 U.S.C. 409), the data and information compiled to identify and determine potential sites which qualify for Federal-Aid highway funds is the same information used to determine the priority and sequence of their upgrading. Under Sections

130, 144 and 152 of 23 U.S.C., the purpose is to identify potential accident sites and to improve and upgrade railway-highway crossings and bridges in order to further the safety of the motoring public, to facilitate the transportation of items in commerce, and to promote the national defense.

23 U.S.C. 409 explicitly states that the data and information compiled in compliance with the Act "shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, or data."

One of the intents of Congress in enacting Section 409 was obviously to prevent the States from having to use state highway matching funds to pay damage claims for accidents occurring at qualifying sites instead of using the funds for the upgrading and safety improvement of such sites. If the courts of Louisiana can force the State to produce the privileged information through discovery, then the intent of Congress in enacting 409 is defeated. Clearly the intention of Congress was not alone to preempt the field relative to the admissibility in court of data compiled under Section 409 but was also to preempt the field relative to the discovery of same.

Louisiana law relative to discovery provides that information is discoverable if it is reasonably calculated to lead to the discovery of admissible evidence. L.S.A.-C.C.P. Art. 1422. Once information is ruled as subject to discovery and becomes the subject of discovery depositions, interrogatories, requests for production, and requests for admission, it is then subject to being used at

trial for impeachment purposes and in the case of the death of a witness, for the introduction of his discovery deposition. Permitting discovery to proceed on matters which the First Circuit concedes are not admissible in evidence at trial is virtually to nullify the effect of 23 U.S.C. 409.

As 23 U.S.C. 409 has preempted the evidentiary field by prohibiting the admissibility of certain evidence at trial, it is the State's position that the same preemption and prohibition applies in the area regarding discovery.

Since 23 U.S.C. 409 is a law of the United States, it is a "Law of the Land" under the Supremacy Clause of the Constitution.

Article VI, Clause 2, of the United States Constitution—the "Supremacy Clause"—states:

> Clause 2. Supreme law.
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The leading case of *McCulloch v. Maryland*, 17 U.S. 315, 4 L.Ed.579 (1819), laid down the fundamental principle that the laws of the United States, when made in conformity with the Constitution, form the supreme law of the land. It further held that states cannot retard, impede, burden or in any way control operations of valid laws enacted by Congress.

In the 1880 case of *Hauenstein v. Lynham*, 100 U.S.

483, 25 L.Ed. 628, the Supreme Court held that the constitution, laws and treaties of the United States are as much a part of the law of every state as that state's own local laws and constitution. Also followed in *Claflin v. Houseman*, 93 U.S. 130, 23 L.Ed. 833 (1876).

Analogous to our case is the 1954 case of *Adams v. Maryland*, 347 U.S. 179, 98 L.Ed. 608, 74 S. Ct. 442, in which the Court held that 18 U.S.C. 3486 prohibited testimony which had been given in congressional inquiries from being used as evidence in any state or federal court. The Supreme Court held that Congress, in the legitimate exercise of its powers in enacting 18 U.S.C. 3486, enacted the supreme law of the land, and hence state courts were bound to follow the statute.

In *Adams*, the federal statute superseded the rules of practice of the State of Maryland.

In our case, the federal statute (23 U.S..C 409) supersedes the discovery rules of the State of Louisiana.

In *U.S. v. Wheeler*, 435 U.S. 313, 55 L.Ed.2d 303, 98 S. Ct. 1079 (1978), the Supreme Court held that the United States Constitution and the supremacy clause gives Congress the power to enact laws superseding conflicting laws of the states.

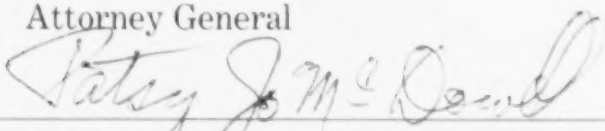
In our case, the Louisiana laws of discovery must yield to the "supreme law of the land," i.e., the United States Constitution and 23 U.S.C. 409. Southern Pacific and American Mutual Liability Insurance Co. are not entitled to force the State of Louisiana to release the information which 23 U.S.C. 409 mandates "shall not be admitted into evidence or considered for other purposes in any action for damages . . ." (Emphasis supplied)

WHEREFORE, the State of Louisiana through the Department of Transportation and Development prays that a Writ of Certiorari issue herein directed to the Louisiana Court of Appeal, First Circuit, ordering it to deliver to this Court the entire records in the consolidated lawsuits numbered 88CW0159 and 88CW0327 on its docket.

The State of Louisiana further prays that after due proceedings had, that there be judgment rendered herein reversing the holding of the Louisiana Court of Appeal, First Circuit, and reinstating the Judgment of the Seventeenth Judicial District Court, dismissing Respondents' Motion to Compel, and holding that the information and data set forth in 23 U.S.C. 409 is privileged and not subject to discovery under the Louisiana discovery statutes, L.S.A.-C.C.P. 1422-1425.

Respectfully submitted:

WILLIAM J. GUSTE, JR.
Attorney General



PATSY JO McDOWELL, Counsel of Record
DAVID NEILSON CRAWFORD
Assistant Attorneys General
LOUISIANA DEPARTMENT OF JUSTICE
Division of Risk Litigation
Post Office Box 94095
Baton Rouge, LA 70804-9095
(504) 342-8495

CERTIFICATE OF SERVICE

The undersigned counsel of record for the State of Louisiana through the Department of Transportation and Development, and a member of the Bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing Petition for Writ of Certiorari to the Louisiana Court of Appeal, First Circuit, have been served on each of the following, by depositing same in a United States mailbox with postage prepaid, this 11 day of May, 1989:

Louisiana Supreme Court
301 Loyola Avenue
New Orleans, Louisiana 70112

Louisiana Court of Appeal, First Circuit
Post Office Box 4408
Baton Rouge, Louisiana 70801

Honorable W.J. Falgout, Judge
17th Judicial District Court
Lafourche Parish
Thibodaux, Louisiana 70302

Southern Pacific Transportation Co.,
Robert Fiegel and Daniel Underwood
through their attorney of record,
John G. Gomila, Jr., Esq.
JONES, WALKER, WAECHTER, POITEVENT,
CARRERE & DENEGRE
Place St. Charles
201 St. Charles Avenue
New Orleans, Louisiana 70170

American Mutual Liability Insurance Co.
as insurer for Nick Martinolich and/or
Nick Martinolich Inc., and Martinolich's
employee, Russell Benoit III,
through their attorney of record,
C. Kelly Lightfoot, Esq.
HAILEY, McNAMARA, HALL, LARMANN &
PAPALE
One Galleria Boulevard
Suite 1400
Metairie, Louisiana 70001

Nick Martinolich and/or Nick Martinolich, Inc.
through his attorney of record,
Risley Triche, Esq.
Attorney at Law
Post Office Drawer 339
Napoleonville, Louisiana 70390

Patsy Jo McDowell

PATSY JO McDOWELL
Assistant Attorney General

APPENDIX

EXHIBITS:

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EXHIBIT NO. 1

17th Judicial District Court
Lafourche Parish
State of Louisiana

NICK MARTINOLICH

vs.

NO. 44,698

SOUTHERN PACIFIC TRANSPORTATION CO., ET AL

* * consolidated with * *

SOUTHERN PACIFIC TRANSPORTATION COMPANY

vs.

NO. 46,788

NICK MARTINOLICH

—

Deposition of JOSEPH L. WAX, taken in the above-entitled cause by Vonda R. Taylor, a Certified Shorthand Reporter, authorized to administer oaths of witnesses pursuant to R.S. 37:2551, as amended, pursuant to the following stipulation, taken at the Department of Transportation and Development, Room 427, 1201 Capitol Access Road, Baton Rouge, Louisiana, 70801, on the 13th day of July, 1987.

APPEARANCES:

JONES, WALKER, WAECHTER, POITEVENT,
CARRERE & DENEGRE
BY: JOHN G. GOMILA, JR.
201 St. Charles Avenue
New Orleans, LA 70170

REPRESENTING SOUTHERN PACIFIC
TRANSPORTATION COMPANY

PATSY COOPER
ATTORNEY AT LAW
1201 Capitol Access Road
Annex - Legal Division
Baton Rouge, LA 70801
REPRESENTING THE DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT

HAILEY, MCNAMARA, HALL, LARMANN &
PAPALE
BY: KELLY LIGHTFOOT
3121 21st Street
Metairie, LA 70002
REPRESENTING NICK MARTINOLICH,
AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY AND
RUSSELL BENOIT

REPORTED BY:

Vonda R. Taylor
Certified Shorthand Reporter

STIPULATION

It is stipulated and agreed by and between all parties that the deposition of JOSEPH L. WAX is hereby being taken pursuant to the Louisiana Code for Civil Procedure for all purposes. The formalities of reading, signing, and certification are all waived. All objections, except those as to the form of the question and the responsiveness of the answer, are reserved until the time of the trial of the cause.

It is further stipulated and agreed that Vonda R. Taylor, in her capacity as a Certified Shorthand Reporter, may swear in the witness.

JOSEPH L. WAX, 2865 Theodosia Drive, Baton Rouge, Louisiana, a witness named in the above stipulation, having been first duly sworn in the cause, was examined and testified on his oath as follows:

EXAMINATION

BY MR. LIGHTFOOT:

Q Mr. Wax, my is Kelly Lightfoot, and I represent American Mutual Liability Insurance Company, Nick Martinolich and Russell Benoit in this law suit. Would you state your full name and address for the record, please.

A Joseph L. Wax, my address is 2865 Theodosia Drive, Baton Rouge, 70809.

Q And you are employed by the Department of Transportation and Development?

A Yes, sir.

Q And what is your position?

A I am Deputy Under Secretary.

Q Formerly you held the position of Project Control Engineer?

A That is correct.

Q When were you promoted from that position to Deputy Under Secretary?

A I was promoted to Deputy Under Secretary March 28, 1982.

Q Most of what we cover here today will deal with your duties as Project Control Engineer, since the accident we are talking about occurred on November 1, 1980. Would you mind explaining for me what your duties were as Project Control Engineer?

A The Project Control Engineer was responsible for advertising projects for receipt of bid, tabulation of bids, assignments of project numbers, preparation of contracts; and seeing that contracts are executed properly, and I am talking about construction contracts, as well as agreements with consulting engineers, municipalities, and negotiating agreements with railroads for the various work that needs to be done as it relates to highways.

Q Okay. Would this include the erection, and instruction of warning devices at railroad crossings?

A No. The only thing that we worked on is actual agreement between the railroad and the department. The actual construction was—actually, the construction is performed by the railroad, or a contractor hired by the railroad, with our people in construction checking to see that installation is made in accordance with the agreement.

Q Would it be fair to say that your office would recommend, and the railroad would either implement or contract out to implement the recommendation?

A Yeah. Basically that is correct.

Q Mr. Wax, do you understand that you have been named as an expert witness to testify in this particular law suit?

A I was just advised of that today.

Q Okay. Prior to today, or today, have you been provided with any materials or reviewed any materials in connection with this particular accident that occurred on November 1, 1980?

A Yes.

Q Okay. Could you tell me what you reviewed?

A I have reviewed the accident report.

MR. GOMILA:

Excuse me. When you say this accident report, that is the police report?

THE WITNESS:

I believe that is what it was, the police report. The Statewide Railroad Highway Master Agreement between the State of Louisiana Department of Highways and Southern Pacific Transportation Company; Assistant Secretary policy and procedure memorandum #9, as it pertains to At Grade Railroad Highway Crossing Warning Devices; and the 1971 addition of the Louisiana Manual on Uniform Traffic Control Devices.

BY MR. LIGHTFOOT:

Q Okay. Does that take care of the materials that you have reviewed in connection with this case?

A To the best of my knowledge.

Q Okay. Did you have an opportunity to review any of those documents prior to today?

A I reviewed some of the documents last week, I believe it was. I don't remember the exact date, but about a week ago, yes.

Q Had you reviewed anything prior to last week concerning this case?

A No.

Q Mr. Wax, could you tell me the area of expertise in which you are expected to testify in this case?

MS. COOPER:

Let me interpose at this point. I really have not talked to Mr. Wax along those lines, unless the lawyer before me, Robert Tally, has.

BY MR. LIGHTFOOT:

Q If you know what area you would be—if it is obvious, go ahead and answer. If you really don't know, please tell me so.

A Well, I am not really sure as to my qualification as an expert on the actual determination, or where any warning devices or crossings, or crossbucks or whatever, involved in the railroad area is concerned, because I really supervise the people who were the experts on actually getting work accomplished. All I was was the supervisor, so I am not really sure that I can qualify as an expert.

Q We have been informed at an earlier deposition to date by Lawrence Harry that an individual by the name of Mike Morgan would be the individual best to tell us about the implementation of a Priority Rating System as far as which crossing was in the most need of warning devices.

MS. COOPER:

I'm going—excuse me.

MR. LIGHTFOOT:

Is that correct to the best of your knowledge?

MS. COOPER:

I'm going to object to that question, or to any answer thereto, because as I understand 23 USC, Section 409; the way the statute reads, the Federal statute reads, is that: "There shall not be admitted into evidence, Federal or State court, or considered for other purposes, any action for damages arising from any occurrence from a location mentioned or address and such report, survey, schedules, list or data, any report, schedules, list or data compiled for the purpose of identifying, evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railroad highway crossings pursuant to sections 130, 144 and 152 of Title XXIII.

MR. LIGHTFOOT:

Counsel, I didn't ask him anything about that. I asked him if Mr. Mike Morgan was an individual who would have that knowledge.

MS. COOPER:

But, this is trying to do indirectly what can't be done directly.

MR. GOMILA:

Are you instructing the witness not to tell us if Mr. Morgan knows something?

MS. COOPER:

I am saying that I am objecting to any line of questioning dealing with anything regarding the railroad priority list that you referred to.

MR. LIGHTFOOT:

Including prior to and subsequent to 1980?

MS. COOPER:

That is right. Anything pertaining to Section 130, 144, and 152 which means the Federal funding of the railroad crossings.

MR. GOMILA:

I'm not sure I got an answer to my question. Is he not—is he instructed not to tell us whether Mr. Morgan is indeed the individual who knows?

MS. COOPER:

Well, if you want to rephrase the question.

MR. GOMILA:

Well, that was the question.

MS. COOPER:

Well, I'm objecting to anything dealing with priority.

MR. GOMILA:

I understand the objection. You certainly have a right to do that. My question is, is he not going to be allowed to tell us whether or not Mr. Morgan is the fellow who knows. I think that is a very straightforward question, it doesn't seek to introduce any priority data. At some point, I think

the State is going to come in and say "The crossing is fine." But we have to be able to test that opinion.

MS. COOPER:

Okay. Answer that, please, sir.

THE WITNESS:

Mr. Morgan would be the individual to answer any questions you may have along the lines of priority listings and what have you.

MR. LIGHTFOOT:

Q Is there any other individuals besides Mr. Morgan who would be able to provide some information to this?

A Mr. Morgan is the only one that I know of at this point and time, since he is the only person now involved—or at that time involved in working up the railroad agreements.

Q Mr. Wax, would Mr. Morgan have been the individual with that knowledge in 1979 and 1980?

MS. COOPER:

I'm going to object to that. I really am going to object to any other question along the line of anything pertaining to a priority listing on updating railroad crossings.

MR. LIGHTFOOT:

We are going to be wasting alot of time, because we are going to have to go into court and get a ruling on that.

MS. COOPER:

That is what I'm expecting.

MR. GOMILA:

Well, we will come back at your expense. Let's go.

MS. COOPER:

Do you want to ask any other questions, besides that, to make the record.

MR. GOMILA:

Let me make sure I understand. Is counsel instructing the witness—now, I understand, sir, this is your department's attorney. If you choose to answer, you may. If she instructs you, you may listen to her or not. But, the department is subject to sanctions . . .

EXHIBIT NO. 2

17th Judicial District Court for the Parish of Lafourche State of Louisiana

NO. 44,698

NICK MARTINOLICH

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.

(CONSOLIDATED WITH)

NO. 46,788

SOUTHERN PACIFIC TRANSPORTATION COMPANY

versus

NICK MARTINOLICH, ET AL.

FILED _____ DEPUTY CLERK _____

MOTION TO COMPEL

COMES NOW, through undersigned counsel, American Mutual Liability Insurance Company, Nick Martinolich, Russell Benoit, III, and Southern Pacific Transportation Company, and on suggesting to the Court that the depositions of the listed experts of the Department of Transportation and Development, Lawrence Harry and Joseph Wax, were taken on July 13, 1987.

That counsel for the Department of Transportation and Development objected to any questions regarding the

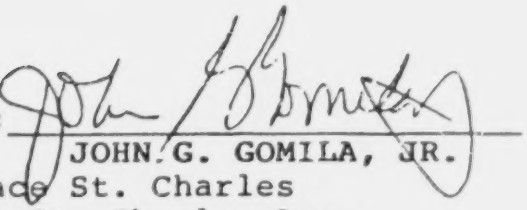
hazard rating system or "prioritizing" for the Southern Pacific Transportation Company railroad crossing at its intersection with Louisiana Highway 3185. Counsel for the Department of Transportation and Development instructed the expert witnesses not to answer any questions in this regard and thereby seriously hendered the ability of counsel for American Mutual Liability Insurance Company from conducting a discovery deposition.

Movers request that the Court issue an order compelling Lawrence Harry and Joseph Wax to re-appear for their depositions and respond to questions concerning the hazard rating system or the "prioritizing" system employed by the Department of Transportation and Development for reasons more fully set forth in the Memorandum in Support of Motion to Compel attached hereto.

Metairie, Louisiana this 6 day of August, 1987.

Respectfully Submitted,

HAILEY, McNAMARA, HALL,
LARMANN & PAPALE

BY: 
JOHN G. GOMILA, JR.

Place St. Charles
201 St. Charles Ave.
New Orleans, LA 70170
Tel: 582-8000
Attorneys for Southern
Pacific Transportation Co.

BY: C. Kelly Lightfoot
C. KELLY LIGHTFOOT

3121 21st Street - P.O. Box 8288
Metairie, Louisiana 70011-8288
Tel: 504-834-9252
Attorneys for American Mutual Liability Insurance Company, Nick Martinolich and Russell Benoit, III

ORDER

IT IS ORDERED that the Department of Transportation and Development show cause on the _____ day of _____, 1987, at _____ o'clock a.m., why it should not be compelled to re-produce Lawrence Harry and Joseph Wax for their depositions, why Lawrence Harry and Joseph Wax should not be ordered to respond to questions concerning the hazard rating system or the "prioritizing" system employed by the Department of Transportation and Development, why sanctions and attorney's fees should not be assessed against the Department of Transportation and Development for unreasonably instructing its listed expert witnesses not to respond to movers' questions, and why the Department of Transportation and Development should not be assessed attorney's fees and costs incurred by movers in bringing this motion and all reasonable expenses incurred in re-taking the depositions of Lawrence Harry and Joseph Wax.

PLEASE SERVE

_____

JUDGE

Department of Transportation
and Development
Through its attorney of record,
PATSY COOPER, ESQ.
Post Office Box 44245
1201 Capitol Annex Drive
Baton Rouge, LA 70804

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6 day of AUGUST, 19 87, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

C Kelly Lightfoot

EXHIBIT NO. 3

17th Judicial District Court for the Parish of Lafourche State of Louisiana

NO. 44,698

NICK MARTINOLICH

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.

(CONSOLIDATED WITH)

NO. 46,788

SOUTHERN PACIFIC TRANSPORTATION COMPANY

versus

NICK MARTINOLICH, ET AL.

FILED _____ DEPUTY CLERK _____

ANSWER OF THE STATE OF LOUISIANA TO MOTION TO COMPEL

NOW COMES, the State of Louisiana, and for Answer to the Motion to Compel filed herein by American Mutual Liability Company, Nick Martinolich, Russell C. Benoit, III and Southern Pacific Transportation Company, shows as follows:

1.

23 USC 409 states as follows:

Admission as evidence of certain reports and surveys

"Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or *railway-highway crossings*, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal aid highway funds shall not be admitted into evidence in Federal or State court or *considered for other purposes* in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data". (Emphasis Supplied)

2.

23 USC 130 pertains to Federal funds that will be made available for railway-highway crossings and 23 USC 144 pertains to Federal funds that will be made available for bridges.

3.

23 USC 152 (a) states:

"(a) Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement".

4.

Counsel for American Mutual, Nick Martinolich, Russell C. Benoit, III, and Southern Pacific, are attempting to do indirectly what they are not permitted by law to do directly.

5.

In *Myers vs. State Farm*, 493 So.2d 1170, 1173, (1986) the Louisiana Supreme Court found that it would be physically and financially impossible to bring all of the State's roads up to modern standards and for that reason the Court held that "The failure of DOTD to reconstruct the State's highways to meet modern standards does not establish the existence of a hazardous defect".

6.

The State of Louisiana through the Department of Transportation and Development is prohibited under 23 USC 409 from releasing any information in any action for damages in State Court both arising from any occurrence at a location mentioned or addressed in the . . . "reports, surveys, schedules, lists, or data . . . compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites . . . or railway-highway crossings".

7.

It would be untenable for the State of Louisiana to lose its Federal funds which are used for the purpose of making our highways and railway crossings safer by permitting, under the guise of "discovery" the release of information which Congress has specifically made privileged in 23 USC 409.

WHEREFORE, the State of Louisiana prays that after due proceedings had, that there be judgment herein rejecting and dismissing the Motion to Compel of American Mutual Liability Insurance Company, Nick Martinolich, Russell C. Benoit, III, and Southern Pacific Transportation Company at their costs.

LOUISIANA DEPARTMENT OF
TRANSPORTATION
AND DEVELOPMENT
OFFICE OF GENERAL COUNSEL

Patsy Jo McDowell

PATSY JO McDOWELL
SENIOR ASSISTANT GENERAL COUNSEL
P. O. BOX 94245
BATON ROUGE, LOUISIANA 70804-9245
TELEPHONE: (504) 379-1019

EXHIBIT NO. 4

17th Judicial District Court for the Parish of Lafourche State of Louisiana

NO. 44,698

NICK MARTINOLICH

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.

(CONSOLIDATED WITH)

SOUTHERN PACIFIC TRANSPORTATION COMPANY

versus

NO. 46,788

NICK MARTINOLICH, ET AL.

FILED _____ DEPUTY CLERK _____

SUPPLEMENTAL ANSWER OF THE STATE OF LOUISIANA OPPOSING MOTION TO COMPEL

Now comes the State of Louisiana, and amends and supplements its Answer to the Motion to Compel by adding the following paragraphs:

8.

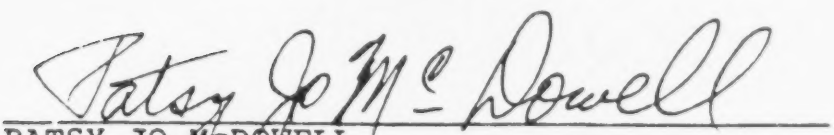
Under Article VI, Clause 2, of the United States Constitution, the "Supremacy Clause" of the Constitution, 23 U.S.C. 409 supersedes the discovery statutes of the State of Louisiana.

9.

The information sought under the Motion to Compel is also contrary to the established case law of the State of Louisiana, to-wit: *Givens v. De Soto Bldg. Co.*, 156 La. 377, 100 So. 534 (1924), and the line of cases which follow it.

WHEREFORE, the State of Louisiana prays that after due proceedings had, that there be judgment herein rejecting and dismissing the Motion to Compel of Southern Pacific et al at their costs.

LOUISIANA DEPARTMENT OF
TRANSPORTATION
AND DEVELOPMENT
OFFICE OF GENERAL COUNSEL



PATSY JO McDOWELL
SENIOR ASSISTANT GENERAL COUNSEL
P. O. BOX 94245
BATON ROUGE, LOUISIANA 70804-9245
TELEPHONE: (504) 379-1019

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing has this day been forwarded via U.S. Mail, postage prepaid and properly addressed, to all known counsel of record.

Baton Rouge, Louisiana, this 1st day of October, 1987.

Patsy J McDowell

PATSY JO McDOWELL

FILED

OCT 2 1987

S/ Tara A. Chiasmie

Dty CLERK OF COURT

A TRUE COPY
Clerk of Court's Office
Thibodaux, La Oct. 6 1987

Audrey A. Landry

Dty **Clerk of Court**

EXHIBIT NO. 5

17th Judicial District Court for the Parish of Lafourche State of Louisiana

NICK MARTINOLICH

versus

NO. 44,698

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.

(CONSOLIDATED WITH)

SOUTHERN PACIFIC TRANSPORTATION COMPANY

versus

NO. 46,788

NICK MARTINOLICH, ET AL.

JUDGMENT

The Motion to Compel which was filed by Nick Martinolich and Southern Pacific Transportation Company and answered by the State of Louisiana has been reviewed by the Court. In considering the law and the memorandums submitted by the parties the Court renders the following judgment.

The Court finds that 23 USC Section 409 creates a privilege as to all information collected pursuant to the federal programs covered by this statute.

IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Compel is denied.

JUDGMENT RENDERED AND SIGNED at Thibodaux, Louisiana, on the 11th day of January, 1988.

Wollen J. Falgoust, Judge
17th Judicial District Court
Division "C"

A TRUE COPY
Clerk of Court's Office
Thibodaux, La. Jan. 12, 1988
Michael J. Guillot
Dty.

-49-

FILED
JAN 11 1988
Michael J. Guillot
CLERK OF COURT
Dty.

EXHIBIT NO. 6

State of Louisiana
Court of Appeal, First Circuit

Post Office Box 4408
Baton Rouge, Louisiana 70821

DOCKET NO. CW/88/0327

NICK MARTINOLICH

versus

SOUTHERN PACIFIC TRANSP. CO.
C/W SOUTHERN PACIFIC TRANS. CO.

versus

NICK MARTINOLICH, ET AL.

DATE: OCTOBER 12, 1988

TO: John Gomila, Jr.
D.O.T.D., Legal Dept.
C. Kelly Lightfoot

NOTICE OF JUDGMENT

You are hereby served with a copy of the opinion in the above entitled case.

Your attention is invited to Rule 2-18 (Rehearing) of the Uniform Rules of the Courts of Appeals, effective July 1, 1982.

CLERK OF COURT

I hereby certify that this opinion and notice of judgment were mailed to the trial judge, the clerk of the trial court, all appeal counsel of record, and all parties not represented by counsel this date.

Karen Hest
STANLEY P. LEMOINE, CLERK
COURT OF APPEAL,
FIRST CIRCUIT

STANLEY P. LEMOINE,
CLERK
COURT OF APPEAL,
FIRST CIRCUIT

AMENDED

TIME DELAY FOR REHEARING, C.C.P. ART. 2166; C.Cr.P ART. 922; Act No. 451, EFFECTIVE AUGUST 30, 1983.

FEE FOR REHEARING, R.S. 13:352, AS AMENDED, EFFECTIVE AUGUST 30, 1986.

State of Louisiana
Court of Appeal
First Circuit

NUMBER 88 CW 0159

NICK MARTINOLICH

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.

NUMBER 88 CW 0327

SOUTHERN PACIFIC TRANSPORTATION COMPANY

versus

NICK MARTINOLICH, ET AL.*

DATE: OCTOBER 12, 1988

ON APPEAL FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT, LAFOURCHE PARISH, LOUISIANA, HONORABLE W. J. FALGOUT, JUDGE.

BEFORE: EDWARDS, SHORTESS, SAVOIE, JJ.

SHORTESS, J.

These consolidated cases stem from a collision which occurred on November 1, 1980, between a train owned by the Southern Pacific Transportation Company (Southern Pacific) and a sugar cane truck owned by Nick Martinolich and operated by Russell Benoit, his employee. The collision occurred in Lafourche Parish at a point where the Southern Pacific railroad tracks traverse Louisiana Highway 3185.

* Reported at 532 So.2d 435 (La. App. 1st Cir., 1988).

Southern Pacific filed suit for its damages against Martinolich, Benoit, and American Mutual Insurance Company. These defendants brought a third party demand against the State of Louisiana, Department of Transportation and Development (DOTD). Martinolich also sued Southern Pacific, DOTD, Robert Fiegel, and Daniel Underwood. In that suit Southern Pacific, Fiegel, and Underwood filed a third party demand against DOTD.

As pretrial discovery progressed, respective counsel for Martinolich and Southern Pacific deposed certain DOTD employees. During the course of the deposition of Joseph H. Wax, Deputy Undersecretary for DOTD, Wax was asked if a Mike Morgan would be the individual best able to discuss the Priority Rating System used to determine which crossings were most in need of warning devices. Counsel for DOTD objected to the question, citing 23 U.S.C. § 409 as authority. After some dialogue between counsel, the witness did answer and stated that Morgan would be the individual to answer questions about priority listings. The witness was then asked if Morgan would have had that knowledge in 1979 and 1980. Counsel for DOTD then stated that she would object to any other questions that pertained to a priority list on updating railroad crossings. After additional dialogue between counsel, questioning of Wax continued until he was asked, "Who makes the decision as to whether or not safety devices or additional safety devices, such as lights and the like, are needed at a particular crossing?" Counsel for DOTD again objected, citing 23 U.S.C. § 409. The deposition was terminated. Martinolich and Southern Pacific filed a motion to compel. The trial court denied the motion and ruled that "23 USC Section 409 creates a privi-

lege as to all information collected pursuant to the federal programs covered by this statute."

Counsel then applied for writs of prohibition, certiorari, mandamus, and review to this court. We granted a writ of certiorari and ordered briefs and oral argument because of our concern over the correctness of the trial court's interlocutory finding that 23 U.S.C. § 409 created a privilege as to all information collected pursuant to the federal programs covered by the statute.

Articles 1421 through 1474 of the Code of Civil Procedure govern discovery in the courts of Louisiana. All matter that is relevant and not privileged is discoverable. LSA-C.C.P. art. 1422.

23 U.S.C. § 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.[1]

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[1] 23 U.S.C. § 130 requires, *inter alia*, that states participating in funding thereunder survey highways to identify railroad crossings which "require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. § 144, similarly, requires, *inter alia*, an inventory of all high-

The trial court specifically determined that 23 U.S.C. § 409 created a privilege which made all information collected non-discoverable, apparently pursuant to the language of LSA-C.C.P. art. 1422.

We find that the trial court's conclusion that a privilege was created as to "all information gathered pursuant to the federal programs covered by this statute" was clearly wrong because it extends the literal wording of 23 U.S.C. § 409, which enumerates, *inter alia*, reports, surveys, and data that are *compiled* for a specific purpose (compliance with either 23 U.S.C. §§ 130, 144, or 152) to "*all information gathered*" (emphasis ours) pursuant to these programs. The trial court's holding additionally misinterprets the effect that this statute can be allowed to have upon our Code of Civil Procedure.

23 U.S.C. § 409 begins with the language "[n]otwithstanding any other provision of law. . . ." The substance that follows this preface, applicable to both federal and state courts, is the regulation of evidence: "[certain documents] . . . shall not be admitted into evidence in Federal or State court or considered for other purposes. . . ." Insofar as this statute applies to the function of state courts conducting their business—it is preemptive.

The United States Constitution provides for

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way bridges "on any Federal-aid system . . . [and] assign each a priority for replacement or rehabilitation. . . ." 23 U.S.C. § 152 requires that participating states survey "all public roads to identify hazardous locations . . . assign priorities for the correction of such locations . . . and implement a schedule of projects for their improvement.

preemption. The supremacy clause empowers Congress[2] within constitutional limitations, to supersede state law. *Hillsborough County Florida v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371, 2375 (1985). Where, as here, the intrusion is into an area traditionally occupied by the states, Congress' intent to preempt must be clear. *Jones v. Rath Packing Co.*, 97 S.Ct. 1305, 1309 (1977). When the possibility of intrusion into a field traditionally left to the states is perceived, there exists a presumption that the states' laws remain valid. *Rath Packing Co.*, 97 S.Ct. at 1309 ("[W]e start with the assumption that the historic police powers of the states were not to be superseded . . . unless that was the clear and manifest purpose of Congress" [citation omitted]); *Automated Medical Laboratories*, 105 S.Ct. at 2376 (noting the presumption that state regulation of health and safety concerns is not superseded by congressional action.)

A state's regulation of its court system is in our opinion as fundamental a function of its sovereignty as the normal exercise of its police power even in matters concerning the health and safety of its citizens. Congress' intrusion, in this instance, however, is constitutionally permissible because Louisiana's participation in the federal funding scheme is voluntary; because the improvement of state highways with federal funds is in pursuit of "[providing] for the general welfare" as provided in U.S. Const. Art. I, § 8, cl. 1 ("spending power"); because it is

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[2] The supremacy clause provides, in pertinent part:
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the land. . . ." U.S. Const. Art. VI, cl. 2.

clear that participation in the funding program requires acquiescence to the intrusion; and, finally, because the intrusion is related to a valid federal interest (inasmuch as 23 U.S.C. § 409 encourages participation in a scheme that ensures, by prioritization, deliberative spending of federal funds). *South Dakota v. Dole*, 107 S.Ct. 2793, 2796 (1987).[3]

Having concluded that 23 U.S.C. § 409 operates to supersede rules governing a fundamental state function,[4] we must now address the extent of the preemption. Clearly Congress has not endeavored, by way of this statute, to occupy the field of Louisiana's evidentiary rules or our Code of Civil Procedure. Where Congressional enactments do not exclude all state legislation in the field,

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[3] *South Dakota v. Dole*, 107 S.Ct. 2793, 2796 (1987) addressed conditioned federal funding under Title 23, specifically 23 U.S.C. 158 (the mandatory drinking age requirement) and the constitutional limitation on conditioned funding under the spending clause:

> [T]he exercise of the spending power must be in pursuit of "the general welfare. . . ." Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation. . . ." Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs."

(Citations omitted). 107 S.Ct. at 2796. *See also Florida v. Mathews*, 526 F.2d 319 (5th Cir. 1976) (noting that conditions imposed on voluntary state participation in funding programs does not infringe upon state sovereignty preserved by the tenth amendment).

[4] *See Patterson v. New York*, 97 S.Ct. 2319, 2322 (1977) (noting the deference to be accorded state procedure in state courts, including matters such as the burden of producing evidence and the burden of persuasion).

preemption is to the extent of the conflict between them. *Rath Packing Company*, 97 S.Ct. at 1310. To determine the extent of the conflict, we are directed to consider the relationship between our rules of evidence and procedure, and 23 U.S.C. § 409. *Id.* Because preemption is not presumed, we construe 23 U.S.C. § 409 restrictively, to intrude only so much as Congress has expressly prescribed. *See Ruth Packing Co.*, 97 S.Ct. at 1309. To determine the intent of Congress, we turn to the federal rules of statutory construction. *See U.S. v. Lemaire*, 826 F.2d 387 (5th Cir. 1987). (holding that the term "final judgment" in 12 U.S.C. § 91 is to be defined according to federal law, notwithstanding that it refers to a judgment in state court); *see also Gary v. State of Louisiana*, 441 F. Supp. 1121 (E.D. La. 1977), *aff'd*, 622 F.2d 804 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 1695 (1981). (holding that although Federal Rule of Civil Procedure 69 provides for execution of judgment according to the "practice or procedure" of the state in which the district court is held, federal, not state, statutory exemptions govern.)

The proscription in 23 U.S.C. § 409 is "shall not be admitted into evidence . . . or considered for other purposes. . . ." The meaning of "shall not be admitted into evidence. . . ." is abundantly clear. We need look no further to discern Congress' intent. *American Trucking Associations, Inc. v. Interstate Commerce Commission*, 659 F.2d 452, 459 (5th Cir. 1981).

The meaning of "or considered for other purposes . . ." is not clear. There is a presumption that the legislature intended the plain meaning of the words it chose. *Louisiana ex rel Guste v. United States*, 656 F.

Supp. 1310, 1315 (W.D. La. 1986). The intended effect of this phrase, however, is not self-evident. The documents made inadmissible by 23 U.S.C. § 409 are not "all information gathered . . ." as the trial court held, but rather "reports, surveys, schedules, lists or data compiled. . . ." This enumeration suggests something more than simple factual information that DOTD has gathered. These documents may reflect mental impressions, conclusions, and opinions of DOTD representatives regarding a survey of railroad grade crossings in need of "separation, relocation, or protective devices . . .," if compiled in compliance with 23 U.S.C. § 130; or mental impressions, conclusions, and opinions of DOTD representatives regarding "hazardous locations, sections, and elements . . . [to be assigned] priorities for the correction of such . . . and [for the implementation of] a schedule of projects for their "improvement," if compiled in compliance with 23 U.S.C. § 152. This is similar to the kind of documentary evidence assembled by expert witnesses that is not subject to discovery under Rule 26 of the Federal Rules of Civil Procedure or under our Code of Civil Procedure.[5] Fed. R. Civ. Pro. 26; *See also* LSA-C.C.P. art. 1424; *Louisiana Department of Transportation and Development v. Stumpf*, 458 So.2d 448 (La. 1984).

The phrase "considered for other purposes . . .," preceded by language referring to admissibility of evidence, implies a finder of fact. A finder of fact *considers* testimony and documentary evidence. We believe that the

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[5] Louisiana's rules of discovery are, in fact patterned after and do not substantially differ from the federal rules. *Ogea v. Jacobs*, 344 So.2d 953, 957 (La. 1977).

catch-all phrase was meant to include *any other trial use* of the enumerated documents; that is to say, that for purposes of the finder of fact, the documents prohibited by 23 U.S.C. § 409 do not exist. They may not be referred to by counsel, and they may not be used for impeachment purposes. They are, however, discoverable, if not otherwise prohibited by LSA-C.C.P. art. 1422, which specifically provides that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[6]

We say this mindful that privileges are the exceptions to and in derogation of the system by which we determine the truth, and cannot be lightly created or expansively construed. *United States v. Nixon*, 94 S.Ct. 3090 (1974). We are additionally aware of the fundamental objectives of Louisiana's discovery process and the liberal construction that articles 1421 through 1474 of the Code of Civil Procedure are to be afforded in order to attain these objectives. *Hodges v. Southern Farm Bureau Casualty Insurance Company*, 433 So.2d 125 (La. 1983). The reports, surveys, data, schedules, and lists collected pursuant to 23 U.S.C. §§ 130, 144, and 152, made inadmissible by 23 U.S.C. § 409, are not privileged within the meaning of LSA-C.C.P. art. 1422, and 23 U.S.C. § 409 does not displace our Code of Civil Procedure so as to make them privileged.

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[6] The documents are *inadmissible* by operation of 23 U.S.C. § 409; therefore, it is incumbent upon the parties seeking to discover them to show that the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Our interpretation of the scope of 23 U.S.C. § 409 is analogous to interpretation by the Eighth Circuit of a Nebraska statute requiring the county coroners to submit a report to the state Department of Motor Vehicles where the driver of a vehicle dies within four hours of a motor vehicle accident. Neb. Rev. Stat. §§ 39-6, 104.07; *Blackledge v. Martin K. Eby Construction Company, Inc.*, 542 F.2d 474, 475 (8th Cir. 1976). The statute required the coroner, in such an instance, to test for and determine the percentage of alcohol in the body of the deceased. *Id.* A related statute provided that neither the report submitted by the coroner nor any statement contained therein "shall be made available for any purpose in any trial arising out of the accident. . . ." Neb. Rev. Stat. §§ 39-6, 104.10; *Blackledge*, 542 F.2d at 476. The court concluded that, in the facts before it, evidence of a motor vehicle accident victim's blood alcohol content was admissible notwithstanding the exclusionary statute because the examination had been made in the "ordinary course of an autopsy ordered by the acting Coroner of Douglas County and not for purposes of any report to be submitted to the Department of Motor Vehicles." *Id.* We suggest this distinction, by analogy, is appropriate in determining the ambit of 23 U.S.C. § 409.

Finally, we address the retroactive application of 23 U.S.C. § 409. The statute was added to Title 23 by Pub. L. No. 100-17, 100 Stat 170 (1987). The collision occurred in 1980. The suits were filed in 1981 and 1982, respectively.

Bradley v. School Board of Richmond, 94 S.Ct. 2006 (1974), requires retroactive application of a change in the law in the absence of legislative mandate to the contrary

or unless such application would cause manifest injustice. *LTV Federal Credit Union v. UMIC Government Securities*, 704 F.2d 199, 202 (5th Cir. 1983); *see also Cort v. Ash*, 95 S.Ct. 2080, 2087 (1975). There is no congressional mandate that 23 U.S.C. § 409 apply prospectively only. Under the construction we give 23 U.S.C. § 409, private litigants will be deprived of certain evidence but not a cause of action. *Cf. California Cartage Company, Inc. v. United States*, 802 F.2d 353 (9th Cir. 1986) (where retroactive application of a statute deprived litigants of standing to sue). We do not accept the contention that applicants will now be unable to prove DOTD's knowledge of a defective condition, if such is the case. In this regard, the right to introduce these documents into evidence, if it be a right, is not one that has become unconditional such that deprivation of this evidence will work manifest injustice on the litigants. *LTV Federal Credit Union*, 704 F.2d at 203. Moreover, the value of the right to introduce this evidence at trial is contingent upon a variety of other contingencies—the outcome of all of which is uncertain. *See California Cartage*, 802 F.2d at 357. We conclude that manifest injustice will not result from the retroactive application of 23 U.S.C. § 409. *See also Anderson v. Anderson*, 520 So.2d 1236 (La. App. 5th Cir.), *writ denied*, 521 So.2d 1187 (La.1988) (citing *Bradley*, 94 S.Ct. 2006, to support the retroactive application of 10 U.S.C. § 1408, the "Federal Uniformed Services Former Spouse Protection Act," so as to allow state courts to consider military pension benefits when determining property rights between parties to a divorce).

For the reasons set forth above, we give 23 U.S.C. § 409 restrictive interpretation. The documents prohib-

ited by § 409 do not exist for the fact finder, and relators in pursuing pretrial discovery are permitted a scope of discovery limited only by the statutory language of LSA-C.C.P. arts. 1422-1425.

All costs of these applications, amounting to $8,254.75,[7] are taxed to DOTD. Attorney fees for Martinolich's and Southern Pacific's counsel are fixed at $2,000.00 each.

INTERLOCUTORY RULING VACATED, AND WRIT MADE ABSOLUTE.

[7] Costs of suit number 88 CW 0159 are $6,967.69, and costs of suit number 88 CW 0327 are $1,287.06.

EXHIBIT NO. 7

The Supreme Court of the State of Louisiana

NICK MARTINOLICH[1]

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.

C/W

SOUTHERN PACIFIC TRANSPORTATION COMPANY

vs.

NICK MARTINOLICH, ET AL.

NO. 88-C - 2769

IN RE: Transportation & Dev. Dept. of; - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CW88 0159, CW88 0327; Parish of Lafourche 17th Judicial District Court Div. "C" Number 44698, 46788

[1] Reported at 535 So.2d 745 (La. 1989).

January 6, 1989

Denied.

LFC

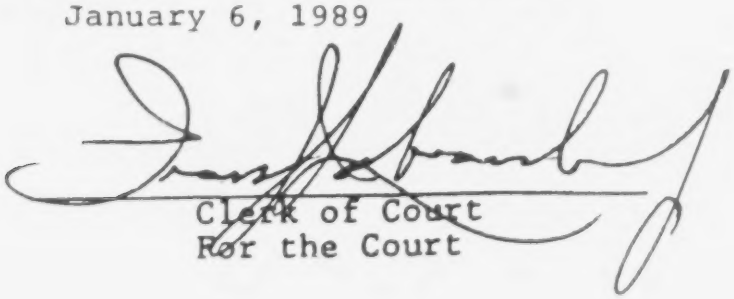
PFC

JLD

JCW

MARCUS & LEMMON, JJ., would grant the writ.

Supreme Court of Louisiana
January 6, 1989



Clerk of Court
For the Court

EXHIBIT NO. 8

23 U.S.C. § 144. Highway bridge replacement and rehabilitation program

(a) Congress hereby finds and declares it to be in the vital interest of the Nation that a highway bridge replacement and rehabilitation program be established to enable the several States to replace or rehabilitate highway bridges over waterways, other topographical barriers, other highways, or railroads when the States and the Secretary finds that a bridge is significantly important and is unsafe because of structural deficiencies, physical deterioration, or functional obsolescence.

(b) The Secretary, in consultation with the States, shall (1) inventory all those highway bridges on any Federal-aid system which are bridges over waterways, other topographical barriers, other highways, and railroads; (2) classify them according to serviceability, safety, and essentiality for public use; (3) based on that classification, assign each a priority for replacement or rehabilitation; and (4) determine the cost of replacing each such bridge with a comparable facility or of rehabilitating such bridge.

(c)(1) The Secretary, in consultation, with the States, shall (1) inventory all those highway bridges on public roads, other than those on any Federal-aid system, which are bridges over waterways, other topographical barriers, other highways, and railroads, (2) classify them according to serviceability, safety, and essentiality for public use, (3) based on the classification, assign each a priority for replacement or rehabilitation and (4) determine the cost of replacing each such bridge with a comparable facility or of rehabilitating such bridge.

(2) The Secretary may, at the request of a State, inventory bridges, on or off the Federal-aid system, for historic significance.

(d) Whenever any State or States make application to the Secretary for assistance in replacing or rehabilitating a highway bridge which the priority system established under subsections (b) and (c) of this section shows to be eligible, the Secretary may approve Federal participation in replacing such bridge with a comparable facility or in rehabilitating such bridge. The Secretary shall determine the eligibility of highway bridges for replacement or rehabilitation for each State based upon the unsafe highway bridges in such State. In approving projects under this section, the Secretary shall give consideration to those projects which will remove from service those highway bridges most in danger of failure.

(e) Funds authorized to carry out this section shall be apportioned among the several States on October 1 of the fiscal year for which authorized in accordance with this subsection. Each deficient bridge shall be placed into one of the following categories: (1) Federal-aid system bridges eligible for replacement, (2) Federal-aid system bridges eligible for rehabilitation, (3) off-system bridges eligible for replacement, and (4) off-system bridges eligible for rehabilitation. The square footage of deficient bridges in each category shall be multiplied by the respective unit price on a State-by-State basis, as determined by the Secretary; and the total cost in each State divided by the total cost of the deficient bridges in all States shall determine the apportionment factors. For purposes of the preceding sentence, the total cost of deficient bridges in a State and in all States shall be reduced by the total cost

of any highway bridges constructed under subsection (m) in such State, relating to replacement of destroyed bridges and ferryboat services. No State shall receive more than 10 per centum or less than 0.25 per centum of the total apportionment for any one fiscal year. The Secretary shall make these determinations based upon the latest available data, which shall be updated annually. Funds apportioned under this section shall be available for expenditure for the same period as funds apportioned for projects on the Federal-aid primary system under this title. Any funds not obligated at the expiration of such period shall be reapportioned by the Secretary to the other States in accordance with this subsection.

(f) The Federal share payable on account of any highway bridge replaced or rehabilitated under this section shall be 80 per centum of the cost thereof.

(g) **Set asides.—**

(1) **Discretionary bridge program.**—Of the amount authorized per fiscal year for each of fiscal years 1987, 1988, 1989, 1990, and 1991 by section 106(a)(5) of the Federal-Aid Highway Act of 1987, all but $225,000,000 per fiscal year shall be apportioned as provided in subsection (e) of this section. $225,000,000 per fiscal year of the amount authorized for each of such fiscal years shall be available for obligation on the date of each such apportionment in the same manner and to the same extent as the sums apportioned on such date, except that the obligation of such $225,000,000 shall, subject to section 149(d) of the Federal-Aid Highway Act of 1987, be at the discretion of the Secretary.

(2) **Eligible discretionary projects.**—Subject to section 149(d) of the Federal-Aid Highway Act of 1987, amounts made available by paragraph (1) for obligation at the discretion of the Secretary may be obligated only—

(A) for a project for a highway bridge the replacement or rehabilitation cost of which is more than $10,000,000, and

(B) for a project for a highway bridge the replacement or rehabilitation cost of which is less than $10,000,000 if such cost is at least twice the amount apportioned to the State in which such bridge is located under subsection (e) for the fiscal year in which application is made for a grant for such bridge.

(3) **Off-system bridges.**—Not less than 15 percent nor more than 35 percent of the amount apportioned to each State in each of fiscal years 1987, 1988, 1989, 1990, and 1991, shall be expended for projects to replace or rehabilitate highway bridges located on public roads, other than those on a Federal-aid system. The Secretary, after consultation with State and local officials, may, with respect to such State, reduce the requirement for expenditure for bridges not on a Federal-aid system when the Secretary determines that such State has inadequate needs to justify such expenditure.

(h) Notwithstanding any other provision of law, the General Bridge Act of 1946 (33 U.S.C. 525-533) shall apply to bridges authorized to be replaced, in whole or in part, by this section, except that subsection (b) of section

502 of such Act of 1946 and section 9 of the Act of March 3, 1899 (30 Stat. 1151) shall not apply to any bridge constructed, reconstructed, rehabilitated, or replaced with assistance under this title, if such bridge is over waters (1) which are not used and are not susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, and (2) which are (a) not tidal, or (b) if tidal, used only by recreational boating, fishing, and other small vessels less than 21 feet in length.

(i) **Inventories and reports.**—The Secretary shall—

(1) report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives on projects approved under this section;

(2) annually revise the current inventories authorized by subsections (b) and (c) of this section;

(3) report to such committees on such inventories; and

(4) report to such committees such recommendations as the Secretary may have for improvements of the program authorized by this section.

Such reports shall be submitted to such committees biennially at the same time as the report required by section 307(e) of this title is submitted to Congress.

(j) Sums apportioned to a State under this section shall be made available for obligation throughout such State on a fair and equitable basis.

(k) Not later than six months after the date of enactment of this subsection, and periodically thereafter, the Secretary shall review the procedure used in approving or disapproving applications submitted under this section to determine what changes, if any, may be made to expedite such procedure. Any such changes shall be implemented by the Secretary as soon as possible. Not later than nine months after the date of enactment of this subsection, the Secretary shall submit a report to Congress which describes such review and such changes, including any recommendations for legislative changes.

(l) Notwithstanding any other provision of law, any bridge which is owned and operated by an agency (1) which does not have taxing powers, (2) whose functions include operating a federally assisted public transit system subsidized by toll revenues, shall be eligible for assistance under this section but the amount of such assistance shall in no event exceed the cumulative amount which such agency has expended for capital and operating costs to subsidize such transit system. Before authorizing an expenditure of funds under this subsection, the Secretary shall determine that the applicant agency has insufficient reserves, surpluses, and projected revenues (over and above those required for bridge and transit capital and operating costs) to fund the necessary bridge replacement or rehabilitation project.

(m) Replacement of destroyed bridges and ferryboat service.—

(1) General rule.—Notwithstanding any other provision of this section or of any other provision of law, a State may utilize any of the funds pro-

vided under this section to construct any bridge which—

(A) replaces any low water crossing (regardless of the length of such low water crossing),

(B) replaces any bridge which was destroyed prior to 1965,

(C) replaces any ferry which was in existence on January 1, 1984, or

(D) replaces any road bridges rendered obsolete as a result of United States Corps of Engineers flood control or channelization projects and not rebuilt with funds from the United States Corps of Engineers.

(2) **Federal share.**—The Federal share payable on any bridge construction carried out under paragraph (1) shall be 80 percent of the cost of such construction.

(n) **Off-system bridge program.**—Notwithstanding any other provision of law, with respect to any project not on a Federal-aid system for the replacement of a bridge or rehabilitation of a bridge which is wholly funded from State and local sources, is eligible for Federal funds under this section, is noncontroversial, is certified by the State to have been carried out in accordance with all standards applicable to such projects under this section, and is determined by the Secretary upon completion to be no longer a deficient bridge, any amount expended after the date of the enactment of this subsection from State and local sources for such project in excess of 20 percent of the cost of construction thereof may be credited to the non-

Federal share of the cost of the projects in such State which are eligible for Federal funds under this section. Such crediting shall be in accordance with such procedures as the Secretary may establish.

(o) Historic bridge program.—

(1) Coordination.—The Secretary shall, in cooperation with the States, implement the programs described in this section in a manner that encourages the inventory, retention, rehabilitation, adaptive reuse, and future study of historic bridges.

(2) State inventory.—The Secretary shall require each State to complete an inventory of all bridges on and off the Federal-aid system to determine their historic significance.

(3) Eligibility.—Reasonable costs associated with actions to preserve, or reduce the impact of a project under this chapter on, the historic integrity of historic bridges shall be eligible as reimbursable project costs under this title (including this section) if the load capacity and safety features of the bridge are adequate to serve the intended use for the life of the bridge; except that in the case of a bridge which is no longer used for motorized vehicular traffic, the costs eligible as reimbursable project costs pursuant to this subsection shall not exceed the estimated cost of demolition of such bridge.

(4) Preservation.—Any State which proposes

to demolish a historic bridge for a replacement project with funds made available to carry out this section shall first make the bridge available for donation to a State, locality, or responsible private entity if such State, locality, or responsible entity enters into an agreement to—

(A) maintain the bridge and the features that give it its historic significance; and

(B) assume all future legal and financial responsibility for the bridge, which may include an agreement to hold the State highway agency harmless in any liability action.

Costs incurred by the State to preserve the historic bridge, including funds made available to the State, locality, or private entity to enable it to accept the bridge, shall be eligible as reimbursable project costs under this chapter up to an amount not to exceed the cost of demolition. Any bridge preserved pursuant to this paragraph shall thereafter not be eligible for any other funds authorized pursuant to this title.

(5) Historic bridge defined.—As used in this subsection, "historic bridge" means any bridge that is listed on, or eligible for listing on, the National Register of Historic Places.

(p) As used in this section the term "rehabilitate" in any of its forms means major work necessary to restore the structural integrity of a bridge as well as work necessary to correct a major safety defect.

EXHIBIT NO. 9

23 U.S.C. § 152. Hazard elimination program

(a) Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

(b) The Secretary may approve as a project under this section any highway safety improvement project.

(c) Funds authorized to carry out this section shall be available for expenditure on any public road (other than a highway on the Interstate System).

(d) The Federal share payable on account of any project under this section shall be 90 percent of the cost thereof.

(e) Funds authorized to be appropriated to carry out this section shall be apportioned to the States as provided in section 402(c) of this title. Such funds shall be available for obligation in the same manner and to the same extent as if such funds were apportioned under section 104(b)(1), except that the Secretary is authorized to waive provisions he deems inconsistent with the purposes of this section.

(f) Each State shall establish an evaluation process approved by the Secretary, to analyze and assess results achieved by highway safety improvement projects carried out in accordance with procedures and criteria es-

tablished by this section. Such evaluation process shall develop cost-benefit data for various types of corrections and treatments which shall be used in setting priorities for highway safety improvement projects.

(g) Each State shall report to the Secretary of Transportation not later than December 30 of each year, on the progress being made to implement highway safety improvement projects for hazard elimination and the effectiveness of such improvements. Each State report shall contain an assessment of the cost of, and safety benefits derived from, the various means and methods used to mitigate or eliminate hazards and the previous and subsequent accident experience at these locations. The Secretary of Transportation shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives not later than April 1 of each year on the progress being made by the States in implementing the hazard elimination program (including but not limited to any projects for pavement marking). The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, means and methods used, and the previous and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (a) and include recommendations for future implementation of the hazard elimination program.

(h) For the purposes of this section the term "State" shall have the meaning given it in section 401 of this title.

EXHIBIT NO. 10

Rules of the Supreme Court

Part V. Jurisdiction on Writ of Certiorari

Rule 17. Considerations Governing Review on Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered. . . .

> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

EXHIBIT NO. 11

L.S.A.-C.C.P. 1422-1425

Art. 1422. Scope of discovery; in general

Unless otherwise limited by order of the court in accordance with this Chapter, the scope of discovery is as set forth in this Article and in Articles 1423 through 1425.

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Art. 1423. Scope of discovery; insurance agreements

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Art. 1424. Scope of discovery; trial preparation; materials

The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, expert, or agent

in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects the mental impressions, conclusions, opinions, or theories of an attorney or an expert.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Article 1469(4) apply to the award of expenses incurred in relation to the motion. For purposes of this Paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Art. 1425. Scope of discovery; trial preparation; experts

Discovery of facts known by experts, otherwise discoverable under the provisions of Article 1422 and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(1)(a) A party may through interrogatories or by deposition require any other party to identify each per-

son whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts to which the expert is expected to testify. (b) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to Paragraph (3) of this Article, concerning fees and expenses as the court may deem appropriate.

(2) A party may discover facts known by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Article 1465 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts on the same subject by other means.

(3) Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Paragraphs (1)(a) and (2) of this Article; and with respect to discovery obtained under Paragraph (1)(a) of this Article the court may require, and with respect to discovery obtained under Paragraph (2) of this Article the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts from the expert.

B-9166, 100, 5/89

No. 88-1856

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

PETITIONER

V.

NICK MARTINOLICH, INC., ET AL,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF FOR RESPONDENT

C. KELLY LIGHTFOOT,
HAILEY, McNAMARA, HALL, LARMANN & PAPALE
Suite 1400, One Galleria Boulevard
P. O. Box 8288
Metairie, Louisiana 70001-8288
Telephone: (504) 836-6500

Counsel for Respondents, American Mutual Liability Insurance Company, Nick Martinolich, Inc. and Russel Benoit, II

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STATUTE AT ISSUE BEFORE THE COURT

A. 23 U.S.C. § 409: **ADMISSION AS EVIDENCE OF CERTAIN REPORTS AND SURVEYS:**

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying (F.N. 1) evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to Sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-Aid Highway Funds shall not be admitted into evidence in Federal or State Court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

APPENDIX

A. Respondents' Motion to Compel and Memorandum in support A-1

B. Respondents' Writ Application to the Louisiana First Circuit Court of Appeal A-12

C. Opinion of Louisiana First Circuit Court of Appeal A-30

D. Respondents' Opposition Brief to State of Louisiana's Writ Application to the Louisiana Supreme Court A-41

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STATEMENT OF THE CASE

On or about November 1, 1980, Russel C. Benoit, II, while driving a cane truck in the course and scope of his employment for Nick Martinolich, Inc. was involved in a collision with a train owned and operated by Southern Pacific Transportation Company at the intersection of Louisiana Highway 3185 and Southern Pacific's Railroad Crossing, approximately two miles from the intersection of Louisiana Highway 1 on the outskirts of Thibodaux, Louisiana.

Russel C. Benoit, II was headed north on Louisiana Highway 3185, carrying a full load of sugar cane. The Southern Pacific train was traveling east, pulling boxcars loaded with refined sugar. At the time of the accident, there were no posted stop signs, flashing signals, lights, bells or gate arms. The only marker present was a standard cross-buck.

At the time of the accident, there were fields of sugar cane, which were standing on either side of the tracks, and which obscured the vision of Russel C. Benoit, II, as to the approaching train.

As a result of the above-described accident, Nick Martinolich filed suit against Southern Pacific Transportation Company, the Louisiana Department of Transportation and Development, Robert N. Figel and Daniel Underwood for damage to the tractor and trailer and for loss of use of the tractor and trailer. Subsequently, Southern Pacific Transportation Company filed suit in the United States District Court, Eastern District of Louisiana, against Nick Martinolich, Russel C. Benoit, II and American Mutual Liability Insurance Company. This suit was subsequently transferred and consolidated with the suit filed by Nick Martinolich.

Respondents, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russel C. Benoit, II filed a Third-Party Demand against the State of Louisiana through the Department of Transportation and Developments, alleging that it failed to properly warn approaching motorists with regard to this particular train crossing.

SUMMARY OF ARGUMENT

23 U.S.C. § 409 does not create a privilege as to the documents, reports, surveys, schedules, lists, or data compiled pursuant to it. 23 U.S.C. § 409 also does not prevent this information from discovery pursuant to Louisiana Code of Civil Procedure Article 1422.

23 U.S.C. § 409 deals exclusively with the admissibility of "reports, surveys, schedules, lists, or data compiled". The statute in no way limits testimony or discovery regarding the identity, evaluation, or actions taken regarding planning the safety enhancement of potential accident sites.

Respondent seeks discovery from the State of Louisiana through the Department of Transportation and Development not to establish that a defective condition existed at this railway-highway crossing, but to establish that the Department of Transportation and Development was negligent in implementing its procedure for evaluating railway-highway crossings.

The discovery sought from the State of Louisiana through the Department of Transportation and Development is reasonably calculated to lead to the discovery of information which will be admissible.

ARGUMENT

The above entitled and numbered cause is brought before this Honorable Court on a Writ of Certiorari by the State of Louisiana through the Department of Transportation and Development. The Writ Application has been brought in response to the denial of Writs by the Louisiana Supreme Court on January 6, 1989. The issue before the trial court, Louisiana First Circuit Court of Appeal, Louisiana Supreme Court, and this Honorable Court, involves the interpretation of 23 U.S.C. § 409 which provides:

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossing, pursuant to Sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-Aid Highway Funds shall not be admitted into evidence in Federal or State Court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

Respondents submit that the First Circuit Court of Appeal correctly determined that the trial court clearly erred in finding that 23 U.S.C. § 409 created a privilege which made all information collected non-discoverable. The Louisiana First Circuit Court of Appeal issued an eleven page opinion

which fully addresses the issues of construction, interpretation and application of the Federal Statute in question. As pointed out by the Louisiana First Circuit Court of Appeal, "the documents made inadmissible by 23 U.S.C. § 409 are not 'all information gathered . . .' as the trial court held, but rather 'reports, surveys, schedules, lists or data compiled . . .' ". It is submitted to this Court that 23 U.S.C. § 409 clearly and unambiguously deals with the admissibility of documentary evidence. The statute in no way limits testimony or discovery regarding the identity, evaluation or actions taken regarding planning the safety enhancement of potential accident sites. Nowhere is the word "privileged" used and nowhere in the statute is there any suggestion that the reports and surveys discussed in the statute are not discoverable.

Respondents do not seek to discover information from the State of Louisiana through the Department of Transportation and Development prior to the accident in order to prove that a negligent or hazardous condition existed at the time of the accident. Respondents seek this information to establish that the State of Louisiana through the Department of Transportation and Development was negligent in implementing its procedure for evaluating railway-highway crossings, and, therefore, this particular crossing failed to receive the proper additional warning signals, devices, et cetera, when it should have.

It is further suggested to the Court that the Louisiana First Circuit Court of Appeal correctly found that "the reports, surveys, data, schedules and lists collected pursuant to 23 U.S.C. § 130, 144, and 152, made inadmissible by 23 U.S.C. § 409, are not privileged within the meaning of LSA - C.C.P. Art. 1422, and 23 U.S.C. § 409 does not displace our Code of Civil Procedure as to make them privileged."

Respondents submit that the discovery of the information in the possession of the State of Louisiana through the Department of Transportation and Development with regard to this particular crossing is reasonably calculated to lead to the discovery of information which will establish that the State of Louisiana through the Department of Transportation and Development was negligent in its evaluation of this particular crossing which information will be admissible.

CONCLUSION

WHEREFORE, respondents, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russel Benoit, II pray that the application of the State of Louisiana through the Department of Transportation and Development for Certiorari, be denied.

Respectfully Submitted,

HAILEY, McNAMARA, HALL, LARMANN & PAPALE

BY: C. Kelly Lightfoot
C. KELLY LIGHTFOOT

Suite 1400, One Galleria Boulevard
P. O. Box 8288
Metairie, Louisiana 70001-8288
Telephone: (504) 836-6500
Counsel for Respondents

PROOF OF SERVICE

The undersigned, counsel for the Respondents, American Mutual Liability Insurance Company, Nick Martinolich, Inc. and Russel Benoit, II, and a member of the Bar of the Supreme Court of the United States, hereby certifies that 3 copies of the foregoing Opposition Brief of the Respondents and Appendix have been served by depositing same in a United States mailbox with postage prepaid, addressed to:

John G. Gomila
JONES, WALKER, WAECHTER, POITEVENT,
CARRERE & DENEGRE
201 St. Charles Avenue
New Orleans, Louisiana 70170

Risley Triche
Attorney at Law
P.O. Drawer 339
Napoleonville, Louisiana 70390

Honorable W.J. Falgout
JUDGE, SEVENTEENTH JUDICIAL DISTRICT COURT
P.O. Box 818
Lafourche, Parish
Thibodaux, Louisiana 70302

William J. Guste, Jr.
Attorney General
State of Louisiana
State Capitol
Division of Risk Litigation
6th Floor, Education Building
P.O. Box 94095
Baton Rouge, Louisiana 70804-9095

Patsy Jo McDowell
David Neilson Crawford
Assistance Attorneys General
State of Louisiana
P.O. Box 94095
Baton Rouge, Louisiana 70804-9095

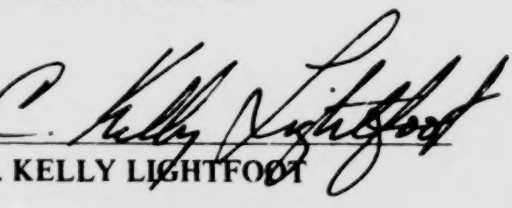
Louisiana Supreme Court
301 Loyola Avenue
New Orleans, Louisiana 70112

First Circuit Court of Appeal
State of Louisiana
P.O. Box 4408
Baton Rouge, Louisiana 70801

Solicitor General
5614 Department of Justice Office
Washington, D.C. 20530

Respectfully Submitted,

HAILEY, McNAMARA, HALL,
LARMANN & PAPALE

BY: 
C. KELLY LIGHTFOOT

Suite 1400, One Galleria Boulevard
P. O. Box 8288
Metairie, Louisiana 70001-8288
Telephone: (504) 836-6500
Counsel for Respondents

APPENDIX

No. 88-1856

In The
Supreme Court of the United States

October Term, 1988

LOUISIANA DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT

PETITIONER

V.

NICK MARTINOLICH, INC., ET AL,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

APPENDIX TO RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

C. KELLY LIGHTFOOT,
HAILEY, McNAMARA, HALL,
LARMANN & PAPALE
Suite 1400, One Galleria Boulevard
P. O. Box 8288
Metairie, Louisiana 70001-8288
Telephone: (504) 836-6500

Counsel for Respondents, American Mutual Liability Insurance Company, Nick Martinolich, Inc. and Russel Benoit, II

EXHIBIT A

Respondents' Motion to Compel and Memorandum in Support

17th JUDICIAL DISTRICT COURT FOR THE PARISH OF LAFOURCHE

STATE OF LOUISIANA

NO. 44,698

NICK MARTINOLICH

VERSUS

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.

(CONSOLIDATED WITH)

NO. 46, 788

SOUTHERN PACIFIC TRANSPORTATION COMPANY

VERSUS

NICK MARTINOLICH, ET AL.

_____ _____

FILED **DEPUTY CLERK**

MOTION TO COMPEL

COMES NOW, through undersigned counsel, American Mutual Liability Insurance Company, Nick Martinolich, Russell Benoit, III, and Southern Pacific Transportation Company, and on suggesting to the Court that the depositions of the listed experts of the Department of Transportation and Development, Lawrence Harry and Joseph Wax, were taken on July 13, 1987.

That counsel for the Department of Transportation and Development objected to any questions regarding the hazard rating system or "prioritizing" for the Southern Pacific Transportation Company railroad crossing at its intersection with Louisiana Highway 3185. Counsel for the Department of Transportation and Development instructed the expert witnesses not to answer any questions in this regard and thereby seriously hendered the ability of counsel for American Mutual Liability Insurance Company from conducting a discovery deposition.

Movers request that the Court issue an order compelling Lawrence Harry and Joseph Wax to re-appear for their depositions and respond to questions concerning the hazard rating system or the "prioritizing" system employed by the Department of Transportation and Development for reasons more fully set forth in the Memorandum in Support of Motion to Compel attached hereto.

Metairie, Louisiana this 6 day of August, 1987.

Respectfully Submitted,

HAILEY, McNAMARA, HALL,
LARMANN & PAPALE

BY: s/s John G. Gomila, Jr.
JOHN G. GOMILA, JR.
Place St. Charles
201 St. Charles Ave.
New Orleans, LA 70170
Tel: 582-8000
Attorneys for Southern Pacific Transportation Co.

BY: s/s C. Kelly Lightfoot
C. KELLY LIGHTFOOT
3121 21st Street
P.O. Box 8288
Metairie, Louisiana 70011-8288
Tel: 504-834-9252
Attorneys for American Mutual Liability Insurance Company, Nick Martinolich and Russell Benoit, III

ORDER

IT IS ORDERED that the Department of Transportation and Development show cause on the 9th day of September, 1987, at 10:00 o'clock a.m., why it should not be compelled to re-produce Lawrence Harry and Joseph Wax for their depositions, why Lawrence Harry and Joseph Wax should not be ordered to respond to questions concerning the hazard rating system or the "prioritizing" system employed by the Department of Transportation and Development, why sanctions and attorney's fees should not be assessed against the Department of Transportation and Development for unreasonably instructing its listed expert witnesses not to respond to movers' questions, and why the Department of Transportation and Development should not be assessed attorney's fees and costs incurred by movers in bringing this motion and all reasonable expenses incurred in re-taking the depositions of Lawrence Harry and Joseph Wax.

s/s M. F. Falgout
JUDGE

PLEASE SERVE

Department of Transportation
and Development
Through its attorney of record,
PATSY COOPER, ESQ.
Post Office Box 44245
1201 Capitol Annex Drive
Baton Rouge, LA 70804

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6 day of August, 1987, served a copy of the foregoing pleading on counsel for all parties to the proceeding, by mailing the same by United States Mail, properly addressed and first class postage prepaid.

s/s C. Kelly Lightfoot

FILED
AUG 10 1987
s/s Tara A. Cheramie
CLERK OF COURT
(stamp)

A TRUE COPY
Clerk of Court's Office
Thibodaux, La. Aug 20, 1987
s/s (illegible)
Clerk of Court
(stamp)

17th JUDICIAL DISTRICT COURT
FOR THE PARISH OF LAFOURCHE

STATE OF LOUISIANA

NO. 44,698

NICK MARTINOLICH

VERSUS

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.

(CONSOLIDATED WITH)

NO. 46,788

SOUTHERN PACIFIC TRANSPORTATION COMPANY

VERSUS

NICK MARTINOLICH, ET AL.

_____ _____

FILED DEPUTY CLERK

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL

MAY IT PLEASE THE COURT:

The depositions of the Department of Transportation and Development experts were taken on July 13, 1987 in Lafayette and Baton Rouge. Counsel for the Department of

Transportation and Development, Pasty Cooper, objected to any questions regarding the hazard rating system or "prioritizing" system which the Department of Transportation and development has for evaluating the need for safety enhancement at railway-highway crossings.

Counsel for the Department of Transportation and Development based her objection on 23 USC Section 409 which provides as follows:

> Section 409. Admission as evidence of certain reports and surveys.
>
> "Not withstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying (FN 1) evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-Aid highway funds shall not be admitted into evidence in Federal or State Court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

FN 1 - probably should have a comma inserted.

Mr. Joseph Wax was questioned concerning his knowledge of what persons within the Department of Transportation

and Development would have knowledge of the hazard rating system or prioritizing" system in 1979 and 1980 as follows:

> By Mr. Lightfoot:
>
> Q: "Mr. Wax, would Mr. Morgan have been the individual with that knowledge in 1979 and 1980?"
>
> Ms. Cooper:
>
> "I'm going to object to that. I really am going to object to any other questions along the line of anything pertaining to a priority list on updating railroad crossings."
>
> Mr. Lightfoot:
>
> "We are going to be wasting a lot of time, because we are going to have to go into Court and get a ruling on that."
>
> Ms. Cooper:
>
> "That is what I'm expecting."
>
> Mr. Gomila:
>
> "Well, we will come back at your expense. Let's go." (Depo of Joseph Wax, page 12, lines 19-25; page 13, lines 1-12).

Counsel for the Department of Transportation and Development again instructed Mr. Joseph Wax not to answer the following question:

By Mr. Gomila:

Q: "Who makes the decision as to whether or not safety devices or additional safety devices, such as lights and the like, are needed at a particular crossing?"

Ms. Cooper:

"I object to that as again, coming under title 23 USC.."

Under Louisiana Code of Civil Procedure Article 1422, discovery is broadly construed to include anything reasonably calculated to lead to the discovery of admissible evidence. Louisiana Code of Civil Procedure Article 1422 provides:

Art. 1422. Scope of discovery; in general

"Unless otherwise limited by order of the Court in accordance with this Chapter, the scope of discovery is as set forth in this Article and in Articles 1423 through 1425. Parties may obtain discovery regarding any matter, not priviledged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *It is not ground for objection that the information sought will be*

> *inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*"
> (Emphasis added).

The provision relied upon by counsel for the Department of Transportation and Development, 23 USC Section 409 is entitled "Admission as Evidence of Certain Reports and Surveys." This statue clearly and unambiguously deals with the admissibility of documentary evidence. The statute in no way limits testimony regarding the identity, evaluation or actions taken regarding planning the safety enhancement of potential accidents sites.

The crux of movers' case against the Department of Transportation and Development is establishing that the Department of Transportation and Development had prior knowledge that this was a dangerous crossing in need of additional warning signals and devices. To construe 23 USC Section 409 to prohibit movers from discovering and putting on testimony regarding the Department of Transportation and Development's actions with regard to the evaluation of this crossing in terms of a "hazard rating" and its need for additional warning signals or devices is to grant the Department of Transportation and Development a blanket immunity, which the legislature clearly has not done.

Based on the above and foregoing, movers request that the Court issue an order compelling Lawrence Harry and Joseph Wax to re-appear for their depositions and respond to questions concerning the hazard rating system or the "prioritizing" system employed by the Department of Transportation and Development.

Movers further request sanctions and attorney's fees against the Department of Transportation and Development for unreasonably instructing its listed expert witnesses not to respond to movers questions; movers further request attorney's fees and costs incurred in bringing this motion and all reasonable expenses incurred in re-taking the depositions of Lawrence Harry and Joseph Wax.

Respectfully Submitted,

HAILEY, McNAMARA, HALL,
LARMANN & PAPALE

BY: s/s C. Kelly Lightfoot
C. KELLY LIGHTFOOT
3121 21st Street
P.O. Box 8288
Metairie, Louisiana 70011-8288
Tel: 504-834-9252
Attorneys for American Mutual Liability Insurance Company, Nick Martinolich and Russell Benoit, III

BY: s/s John G. Gomila, Jr.
JOHN G. GOMILA, JR.
Place St. Charles
201 St. Charles Avenue
New Orleans, Louisiana 70170
Tel: 504-582-8000
Attorneys for Southern Pacific Transportation Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon opposing counsel of record, by placing a copy of same in the United States mail, properly addressed and first class postage prepaid, this 6 day of August, 1987.

s/s C. Kelly Lightfoot

FILED
AUG 10 1987
s/s Tara A. Cheramie
DEPUTY CLERK OF COURT
(stamp)

A-12

EXHIBIT B

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

NO. 88 CW0159

NICK MARTINOLICH

VERSUS

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET. AL.

(CONSOLIDATED WITH)

SOUTHERN PACIFIC TRANSPORTATION COMPANY

VERSUS

NICK MARTINOLICH, ET. AL.

COURT OF APPEAL FIRST CIRCUIT
Filed
JAN 26 1988
s/s Stanley F. Lemoine
Clerk
(stamp)

APPLICATION FOR SUPERVISORY WRITS
OF PROHIBITION, CERTIORARI, MANDAMUS AND
REVIEW TO THE HONORABLE COURT OF APPEAL,
FIRST CIRCUIT, STATE OF LOUISIANA

Respectfully Submitted,

HAILEY, McNAMARA, HALL,
LARMANN & PAPALE

BY: s/s C. Kelly Lightfoot
C. KELLY LIGHTFOOT
W. MARVIN HALL

3121 21st Street - P. O. Box 8288
Metairie, Louisiana 70011-8288
Telephone: (504) 834-9252
Attorneys for **AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, NICK MARTINOLICH and/or NICK MARTINOLICH, INC. AND RUSSELL BENOIT, II**

RECEIVED
JAN 29 1988
(stamp)

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COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

NO. 88-CWO159

NICK MARTINOLICH

VERSUS

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET. AL.

(CONSOLIDATED WITH)

SOUTHERN PACIFIC TRANSPORTATION COMPANY

VERSUS

NICK MARTINOLICH, ET. AL.

APPLICATION FOR SUPERVISORY WRITS OF PROHIBITION, CERTIORARI, MANDAMUS AND REVIEW TO THE HONORABLE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA

The application of American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc., and Russell Benoit, II in these proceedings entitled "Nick Martinolich v. Southern Pacific Transportation Company, et al. (consolidated with) Southern Pacific Transportation

Company v. Nick Martinolich, et al.," Nos. 44,698 and 46,788, Division "C", 17th Judicial District Court for the Parish of LaFourche, State of Louisiana, applying for Supervisory Writs directed to respondents, Louisiana Department of Transportation and Development and the Honorable Wollen J. Falgout, Judge, Division "C", 17th Judicial District Court, Parish of LaFourche, State of Louisiana, respectfully represents that:

II. *STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED*

The Jurisdiction of this Court is invoked in accordance with Article V, Section 10 of the Louisiana Constitution, Article 2201 of the Louisiana Code of Civil Procedure and Rule 4 of the Uniform Rules of The Court of Appeal.

III. *STATEMENT OF THE CASE*

On or about November 1, 1980, Russell C. Benoit, II, while driving a cane truck in the course and scope of his employment for Nick Martinolich, Inc. was involved in a collision with a train owned and operated by Southern Pacific Transportation Company at the intersection of Louisiana Highway 3185 and Southern Pacific's railroad crossing, approximately two miles from the intersection of Louisiana Highway 1 on the outskirts of Thibodaux, Louisiana.

Russell C. Benoit, II was headed north on Louisiana Highway 3185, carrying a full load of sugar cane. The Southern Pacific train was traveling east, pulling boxcars loaded with refined sugar. At the time of the accident, there were no posted stop signs, flashing signals, lights, bells or gate arms. The only marker present was a standard cross-buck.

At the time of the accident, there were fields of sugar cane, which were standing on either side of the tracks, and which obscured the vision of Russell C. Benoit, II, as to the approaching train.

As Russell C. Benoit's cane truck entered the intersection of Louisiana Highway 3185 and Southern Pacific's railroad crossing, his cane truck was struck by the Southern Pacific train.

As a result of the above-described accident, Nick Martinolich filed suit against Southern Pacific Transportation Company, the Louisiana Department of Transportation and Development, Robert N. Figel and Daniel Underwood for damage to the tractor and trailer and for loss of use of the tractor and trailer. Subsequently, Southern Pacific Transportation Company filed suit in the United States District Court, Eastern District of Louisiana, against Nick Martinolich, Russell C. Benoit, III and American Mutual Liability Insurance Company. This suit was subsequently transferred and consolidated with the suit filed by Nick Martinolich.

Defendants/Applicants, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russell C. Benoit, II filed a Third-Party Demand against the State of Louisiana, Department of Transportation and Development, alleging that it failed to properly warn approaching motorist with regard to this particular train crossing.

On July 13, 1987, defendants/applicants, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russell C. Benoit, II attempted to depose the listed experts of the Department of Transportation and Development, Lawrence Harry and Joseph Wax. Counsel for the Department of Transportation

and Development objected to, and instructed the Department of Transportation and Development's expert witnesses not to answer any questions regarding the hazard rating system or "prioritizing" system which the Department of Transportation and Development utilizes for evaluating the need for safety enhancement at railway-highway crossings. As a result, defendants/applicants, American Mutual Liability Insurance Company,, Nick Martinolich and/or Nick Martinolich, Inc. and Russell C. Benoit, II filed a Motion to Compel requesting that the trial court issue an Order compelling the Department of Transportation and Development's experts, Lawrence Harry and Joseph Wax, to re-appear for their depositions and respond to questions concerning the hazard rating system or the "prioritizing" system employed by the Department of Transportation and Development. (A copy of defendants' Motion to Compel and Memorandum in Support Thereof is attached hereto as Exhibit 1). The State of Louisiana, Department of Transportation and Development., filed an Answer to Motion to Compel and a Memorandum Opposing the Motion to Compel (a copy of which is attached hereto as Exhibits 2A and 2B). Southern Pacific Transportation Company filed a Supplemental Memorandum in Support of Motion to Strike and/or Motion to Compel Response to Deposition Questions (a copy of which is attached hereto as Exhibit 3). Defendants also filed a Supplemental Memorandum in Support of Motion to Strike and/or Motion to Compel on behalf of Nick Martinolich and/or Nick Martinolich, Inc., Russell Benoit, II, and American Mutual Liability Insurance Company (a copy of which is attached hereto as Exhibit 4). Finally, the State of Louisiana filed a Supplemental Memorandum on behalf of the State of Louisiana opposing the Motion to Compel (a copy of which is attached hereto as Exhibit 5).

The Motion to Compel filed by defendants, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russell C. Benoit, II was submitted on briefs before the Honorable Wollen J. Falgout on the eleventh day of January, 1988. Judge Falgout denied the Motion to Compel and went further to hold that 23 U.S.C. Section 409 creates a privilege as to all information collected pursuant to the Federal Programs covered by this statute.

Defendants thereafter filed a Notice of Intention to Apply for Supervisory Writs and an Order Fixing Time Within Which Application for Supervisory Writs Shall Be Filed (a copy of each are attached hereto as Exhibits 6 and 7).

IV. *ISSUES AND QUESTIONS OF LAW PRESENTED FOR DETERMINATION*

A. Whether 23 U.S.C. Section 409 creates a privilege as to all information collected pursuant to the Federal Programs covered by this statute.

B. Whether 23 U.S.C. Section 409 in any way limits testimony regarding the identity, procedure, evaluation, or actions taken regarding the planning of safety enhancements prior to the accident of November 1, 1980 at the intersection of Louisiana Highway 3185 and Southern Pacific's railroad crossing.

C. Whether Louisiana Code of Civil Procedure Article 1422 allows for the discovery of the Department of Transportation and Development's actions prior to November 1, 1980 with regard to its evaluation of the railroad crossing at the intersection of Louisiana Highway 3185 and Southern Pacific's railroad tracks and this crossings need for additional warning signals and/or devices.

D. Whether 23 U.S. Section 409 can be afforded retroactive application so as to apply in this case.

V. *ASSIGMENTS OR SPECIFICATIONS OF ERROR*

A. The trial court acted erroneously and without legal basis in holding that 23 U.S.C. Section 409 creates a privilege as to all information collected pursuant to the Federal Programs covered by this statute.

B. The trial court was in error in denying the Motion to Compel Discovery of the Department of Transportation and Development's experts with regard to their knowledge of the actions taken by the Department of Transportation and Development prior to November 1, 1980 with regard to its evaluation of the railroad crossing located at the intersection of Louisiana Highway 3185 and Southern Pacific's railroad tracks and with regard to this crossing's need for additional warning signals and/or devices.

VI. *ARGUMENT*

Counsel for the Department of Transportation and Development bases her objection to defendants' Motion to Compel on 23 U.S.C. Section 409 which provides as follows:

> "Section 409. Admission as evidence of certain reports and surveys.
>
> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying (FN1) evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to Sections 130,

> 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-Aid Highway Funds shall not be admitted into evidence in Federal or State Court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data." (Copy of statute and legislative history attached as Exhibit 9).

This statute clearly and unambiguously deals with the admissibility of documentary evidence. The statute in no way limits testimony or discovery regarding the identity, evaluation or actions taken regarding planning the safety enhancement of potential accident sites. Nowhere in the statute is the word "privilege" used, and nowhere in the statute is there any suggestion that the reports and surveys discussed in the statute are undiscoverable.

Counsel for the Department of Transportation and Development has argued that "the purposes and objectives of Congress in enacting 23 U.S.C. 409 was to ensure that the information compiled by the states in identifying, evaluating and planning safety enhancements of railway-highway crossings, bridges, and the like, would not be used to defeat the purpose of the Federal-Aid Highway Funds Act. This Act was enacted in order to increase the protection of our citizens in traveling as well as to upgrade our highway systems, thus increasing efficiency, economy and our national defense." However, the statute clearly does not grant immunity to the states when they poorly or negligently identify potential safety hazards at railroad crossings. If such had been the intent of Congress in enacting 23 U.S.C. 409, Congress very easily could have stated that the states

were immune from any suit regarding its identification, evaluation and plans for safety enhancement of railway-highway crossings, bridges, and the like. Congress, in enacting 23 U.S.C. 409, also could have very easily stated in plain language that any information regarding the identification, evaluation and plans for safety enhancement of railway-highway crossings, bridges, and the like were privileged. Congress did not, however, suggest or state these objectives in enacting 23 U.S.C. 409.

In the State of Louisiana's Supplemental Memorandum Opposing Defendants' Motion to Compel, it suggests that defendants are attempting to discover the activities taken by the Department of Transportation and Development subsequent to the accident of November 1, 1980. However, defendants submit that they are only trying to identify what actions were taken by the Department of Transportation and Development prior to the accident of November 1, 1980.

In order for applicants to prove a case against the Department of Transportation and Development it is necessary to establish that the Department of Transportation and Development had prior knowledge that this was a dangerous crossing in need of additional warning signals and/or devices, but that it failed to provide same. The thrust of applicant's case against the Department of Transportation and Development is that this particular crossing had, at the time of the accident, a higher rating in terms of need for additional warning signals and/or devices than other railroad crossings which were provided with additional warning signals and/or devices. Apparently, this particular crossing was negligently overlooked and/or missed and did not get additional warning signals and/or devices when it should have. It is submitted to this Honorable Court that the Trial Judge erred in holding that 23 U.S.C. Section 409 creates a privilege as to all infor-

mation collected pursuant to the Federal Programs covered by the statute. Such a holding prohibits defendants from discovering and putting on testimony regarding the Department of Transportation and Development's actions with regard to its evaluation of this crossing and the crossing's need for additional warning signals or devices. Such a reading of the statute is to grant the Department of Transportation and Development a blanket immunity, which Congress clearly has not done.

As has been held by this Court, it is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Hodges v. Southern Farm Bureau Cas. Ins. Co.*, 433 So.2d 125 (La. 1983); *Freeman v. Guaranty Broadcasting Corp.*, 498 So.2d 218 (La. App. 1st Cir. 1986).

With regard to the assertion of privileges, this Court has followed the interpretation by the Louisiana Supreme Court in *Conella v. Johnson*, 345 So.2d 498 (La. 1977). *Conella* involved the privilege of pending criminal litigation, LSA-R.S. 44:3. In addressing the issue of whether or not a valid privilege existed, the Supreme Court reversed the trial judge, and held that LSA-R.S. 44:3 requires more than a judicial acceptance of the prosecutor's assertion of the privilege. The Court stated that a meaningful opportunity must be afforded for a cross-examination and presentation of evidence to contradict the assertion of the privilege. If the party seeking the information in the civil action can demonstrate the inapplicability of the privilege, the records sought must be made available to him. *Freeman v. Guaranty Broadcasting Corp.*, 498 So.2d 218 (La. App. 1st Cir. 1986) citing *Conella v. Johnson, supra*.

Applicants' submit that 23 U.S.C. 409 creates no such privilege. It is further submitted that the trial court erred in accepting the bald assertion by counsel for the Department of Transportation and Development that 23 U.S.C. 409 does create such a privilege.

Finally, defendants/applicants submit to the Court that 23 U.S.C. Section 409, approved on April 2, 1987, should not be afforded retrospective application. Retrospective operation is not favored by the Courts, and a law will not be construed as retroactive unless the Act clearly, by express language of necessary implication, indicates that Congress intended retroactive application. *Nasser v. Hudson Waterways Corporation*, 563 F.Supp. 88 (D.C. Wash. 1983) citing *United States v. Whyel*, 23 F.2d 30, 32 (3d Cir. 1928), *cert. den.* 278 U.S. 664, 49 S.Ct. 178, 73 L.Ed. 570 (1928); *Arlington Coalition On Transportation v. Volpe*, 458 F.2d 1323, 1331 (4th Cir. 1972).

To avoid the unfairness often inherent in a retroactive statute, Courts will normally presume that a legislative enactment is to apply prospectively from the date of enactment. *Cox v. Schweiker*, 684 F.2d 310 (5th Cir. 1982) citing *U.S. v. Donnelly's Estate*, 387 U.S. 286, 90 S.Ct. 1033, 25 L.Ed. 2d 312 (1970); The presumption obtains unless there is an unequivocal statutory directive mandating retroactive application. *Cox v. Schweiker, supra.*, citing *Corpus v. Estelle*, 605 F.2d 175 (5th Cir.), *cert. den.*, 445 U.S. 919, 100 S.Ct. 1284, 63 L.Ed. 2d 605 (1979); *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers v. NLRB*, 316 F.2d 373 (D.C. Cir. 1963).

Since the Department of Transportation and Development is relying on a federal statute, federal law governs the application and operation of such a law. Clearly, the above cited

federal law indicates that a federal statute is not to be given retroactive application unless Congress has clearly and unequivocally stated such an objective. Such an objective is not found in either the statute or accompanying legislative history. (Attached hereto as Exhibit 9).

VII. *JUDGMENT COMPLAINED OF*

A copy of the Judgment denying defendants' Motion to Compel signed by the Honorable Wollen J. Falgout on the eleventh day of January, 1988 is attached hereto as Exhibit 8.

VIII. *JUDGE'S REASONS FOR JUDGMENT*

The Honorable Wollen J. Falgout's reasons for judgment are incorporated in the Judgment denying defendants' Motion to Compel attached hereto as Exhibit 8.

IX. *PLEADINGS ON WHICH JUDGMENT IS FOUNDED*

Copies of the following pleadings are attached:

A. Motion to Compel on behalf of American Mutual Liability Insurance Company, Nick Martinolich, Russell Benoit, III, and Southern Pacific Transportation Company attached hereto as Exhibit 1;

B. Answer of State of Louisiana to Motion to Compel and Memorandum Opposing the Motion to Compel attached as Exhibits 2A and 2B;

C. Supplemental Memorandum in Support of Motion to Strike and/or Motion to Compel

Response to Deposition Questions attached hereto as Exhibit 3;

D. Supplemental Memorandum in Support of Motion to Strike and/or Motion to Compel on behalf of Nick Martinolich and/or Nick Martinolich, Inc., Russell Benoit, II, and American Mutual Insurance Company attached hereto as Exhibit 4; and

E. Supplemental Memorandum on behalf of the State of Louisiana Opposing the Motion to Compel attached hereto as Exhibit 5.

X. *PERTINENT MINUTES OF THE COURT*

There are no known minutes pertaining to the Judgment rendered by the Honorable Wollen J. Falgout on January 11, 1988.

XI. *SUMMARY AND CONCLUSION*

The trial court acted erroneously and without legal basis in denying defendants' Motion to Compel and in holding that 23 U.S.C. Section 409 creates a privilege as to all information collected pursuant to the Federal Programs covered by this statute.

Based on the foregoing and the Exhibits attached to this Application for Supervisory Writs, applicants, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russell C. Benoit, II pray for the following relief:

1. That an Order be issued reversing the Judgment rendered by the Honorable Wollen J. Falgout on January 11, 1988;

2. An Order compelling the Department of Transportation and Development's experts, Lawrence Harry and Joseph Wax, to re-appear for their depositions *and* respond to questions concerning the hazard rating system or the "prioritizing" system employed by the Department of Transportation and Development in its evaluation of railroad crossings;

3. An Order imposing sanctions and attorney's fees against the Department of Transportation and Development for unreasonably instructing its listed expert witnesses not to respond to defendants questions;

4. An Order assessing reasonable attorney's fees and costs incurred by defendants in re-taking the depositions of Lawrence Harry and Joseph Wax;

5. An Order that 23 U.S.C. Section 409 is not to be afforded retrospective application; and

6. Applicants further pray for all other Orders as equity may require be issued.

Respectfully Submitted,

HAILEY, McNAMARA, HALL, LARMANN & PAPALE

BY: s/s C. Kelly Lightfoot
C. KELLY LIGHTFOOT
W. MARVIN HALL
3121 21st Street - P. O. Box 8288
Metairie, Louisiana 70011-8288
Telephone: (504) 834-9252
Attorneys for **AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, NICK MARTINOLICH and/or NICK MARTINOLICH, INC. AND RUSSELL BENOIT, II**

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally appeared C. KELLY LIGHTFOOT, who being duly sworn, deposed and said that he is counsel for defendants, **AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, NICK MARTINOLICH and/or NICK MARTINOLICH, INC. AND RUSSELL C. BENOIT, II** in the above numbered and entitled action, and applicants in the above and foregoing Application for Supervisory Writs; that he has prepared and read said Application and that all of the allegations contained therein are true and correct; copies of this Application were duly served upon the Honorable Wollen J. Falgout, Judge, Division "C", 17th Judicial District Court, Parish of La-Fourche, State of Louisiana, and to all counsel by placing copies in the mail, postage paid on the 26 day of January, 1988.

s/s C. Kelly Lightfoot
C. KELLY LIGHTFOOT

SWORN TO AND SUBSCRIBED
BEFORE ME, THIS 26th
DAY OF Jan.,
1988.

s/s David K. Pusons
NOTARY PUBLIC

EXHIBIT C

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 88 CW 0159

NICK MARTINOLICH

VERSUS

SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.

NUMBER 88 CW 0327

SOUTHERN PACIFIC TRANSPORTATION COMPANY

VERSUS

NICK MARTINOLICH, ET AL.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT, LAFOURCHE PARISH, LOUISIANA, HONORABLE W. J. FALGOUT, JUDGE.

BEFORE: EDWARDS, SHORTESS, SAVOIE, JJ.

OCT 12 1988
(stamp)

SHORTESS, J.

These consolidated cases stem from a collision which occurred on November 1, 1980, between a train owned by the Southern Pacific Transportation Company (Southern Pacific) and a sugar cane truck owned by Nick Martinolich and operated by Russell Benoit, his employee. The collision occurred in Lafourche Parish at a point where the Southern Pacific railroad tracks traverse Louisiana Highway 3185.

Southern Pacific filed suit for its damages against Martinolich, Benoit, and American Mutual Insurance Company. These defendants brought a third party demand against the State of Louisiana, Department of Transportation and Development (DOTD). Martinolich also sued Southern Pacific, DOTD, Robert Fiegel, and Daniel Underwood. In that suit Southern Pacific, Fiegel, and Underwood filed a third party demand against DOTD.

As pretrial discovery progressed, respective counsel for Martinolich and Southern Pacific deposed certain DOTD employees. During the course of the deposition of Joseph H. Wax, Deputy Undersecretary for DOTD, Wax was asked if a Mike Morgan would be the individual best able to discuss the Priority Rating System used to determine which crossings were most in need of warning devices. Counsel for DOTD objected to the question, citing 23 U.S.C. §409 as authority. After some dialogue between counsel, the witness did answer and stated that Morgan would be the individual to answer questions about priority listings. The witness was then asked if Morgan would have had that knowledge in 1979 and 1980. Counsel for DOTD then stated that she would object to any other questions that pertained to a priority list on updating railroad crossings. After additional dialogue between counsel, questioning of Wax continued until he was asked, "Who makes the decision as to whether or not safety

devices or additional safety devices, such as lights and the like, are needed at a particular crossing?" Counsel for DOTD again objected, citing 23 U.S.C. §490. The deposition was terminated. Martinolich and Southern Pacific filed a motion to compel. The trial court denied the motion and ruled that "23 USC Section 409 creates a privilege as to all information collected pursuant to the federal programs covered by this statute."

Counsel then applied for writs of prohibition, certiorari, mandamus, and review to this court. We granted a writ of certiorari and ordered briefs and oral argument because of our concern over the correctness of the trial court's interlocutory finding that 23 U.S.C. §409 created a privilege as to all information collected pursuant to the federal programs covered by the statute.

Articles 1421 through 1474 of the Code of Civil Procedure govern discovery in the courts of Louisiana. All matter that is relevant and not privileged is discoverable. LSA-C.C.P. art. 1422.

23 U.S.C. §409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway saftey construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State

> court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.[1]

The trial court specifically determined that 23 U.S.C. § 409 created a privilege which made all information collected non-discoverable, apparently pursuant to the language of LSA-C.C.P. art. 1422.

We find that the trial court's conclusion that a privilege was created as to "all information gathered pursuant to the federal programs covered by this statute" was clearly wrong because it extends the literal wording of 23 U.S.C. §409, which enumerates, *inter alia*, reports, surveys, and data that are *compiled* for a specific purpose (compliance with either U.S.C. §§ 130, 144, or 152) to "*all information gathered*" (emphasis ours) pursuant to these programs. The trial court's holding additionally misinterpretes the effect that this statute can be allowed to have upon our Code of Civil Procedure.

23 U.S.C. §409 begins with the language "[n]otwithstanding any other provision of law . . .." The substance that follows this preface, applicable to both federal and state courts, is the regulation of evidence: "[certain documents] . . . shall not be admitted into evidence in Federal or State

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1. 23 U.S.C. §130 requires, *inter alia*, that states participating in funding thereunder survey highways to identify railroad crossings which "require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. §144, similarly, requires, *inter alia*, an inventory of all highway bridges "on any Federal-aid system . . . [and] assign each a priority for replacement or rehabilitation . . .." 23 U.S.C. §152 requires that participating states survey "all public roads to identify hazardous locations . . . and implement a schedule of projects for their improvement.

court or considered for other purposes . . .." Insofar as this statute applies to the function of state courts conducting their business–it is preemptive.

The United States Constitution provides for preemption. The supremacy clause empowers Congress,[2] within constitutional limitations, to supersede state law. *Hillsborough County Florida v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371, 2375 (1985). Where, as here, the intrusion is into an area traditionally occupied by the states, Congress' intent to preempt must be clear. *Jones v. Rath Packing Co.*, 97 S.Ct. 1305, 1309 (1977). When the possibility of intrusion into a field traditionally left to the states is perceived, there exists a presumption that the states' laws remain valid. *Rath Packing Co.*, 97 S.Ct. at 1309 ("[W]e start with the assumption that the historic police powers of the states were not to be superseded . . . unless that was the clear and manifest purpose of Congress" [citation omitted]); *Automated Medical Laboratories*, 105 S.Ct. at 2376 (noting the presumption that state regulation of health and safety concerns is not superseded by congressional action.)

A state's regulation of its court system is in our opinion as fundamental a function of its sovereignty as the normal exercise of its police power even in matters concerning the health and safety of its citizens. Congress' intrusion, in this instance, however, is constitutionally permissible because Louisiana's participation in the federal funding scheme is voluntary; because the improvement of state highways with

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2. The supremacy clause provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the land . . .." U.S. Const. Art. VI, cl. 2.

federal funds is in pursuit of "[providing] for the general welfare" as provided in U.S. Const. Art. I, §8, cl. 1 ("spending power"); because it is clear that participation in the funding program requires acquiescence to the intrusion; and, finally, because the intrusion is related to a valid federal interest (inasmuch as 23 U.S.C. §409 encourages participation in a scheme that ensures, by prioritization, deliberative spending of federal funds). *South Dakota v. Dole*, 107 S.Ct. 2793, 2796 (1987).[3]

Having concluded that 23 U.S.C. § 409 operates to supersede rules governing a fundamental state function,[4] we must

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3. *South Dakota v. Dole*, 107 S.Ct. 2793, 2796 (1987) addressed conditioned federal funding under Title 23, specifically 23 U.S.C. 158 (the mandatory drinking age requirement) and the constitutional limitation on conditioned funding under the spending clause:

> [T]he exercise of the spending power must be in pursuit of "the general welfare.. . . ." Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.. . ." " Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs."

(Citations omitted). 107 S.Ct. at 2796. *See also Florida v. Mathews*, 526 F.2d 319 (5th Cir. 1976) (noting that conditions imposed on voluntary state participation in funding programs does not infringe upon state sovereignty preserved by the tenth amendment).

4. *See Patterson v. New York*, 97 S.Ct. 2319, 2322 (1977) (noting the deference to be accorded state procedure in state courts, including matters such as the burden of producing evidence and the burden of persuasion).

now address the extent of the preemption. Clearly Congress has not endeavored, by way of this statute, to occupy the field of Louisiana's evidentiary rules or our Code of Civil Procedure. Where Congressional enactments do not exclude all state legislation in the field, preemption is to the extent of the conflict between them. *Rath Packing Company*, 97 S.Ct. at 1310. To determine the extent of the conflict, we are directed to consider the relationship between our rules of evidence and procedure, and 23 U.S.C. §409. *Id.* Because preemption is not presumed, we construe 23 U.S.C. § 409 restrictively, to intrude only so much as Congress has expressly prescribed. *See Ruth Packing Co.*, 97 S.Ct. at 1309. To determine the intent of Congress, we turn to the federal rules of statutory construction. *See U.S. v. Lemaire*, 826 F.2d 387 (5th Cir. 1987). (holding that the term "final judgment" in 12 U.S.C. § 91 is to be defined according to federal law, notwithstanding that it refers to a judgment in state court); *see also Gary v. State of Louisiana*, 441 F. Supp. 1121 (E.D. La. 1977), *aff'd*, 622 F.2d 804 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 1695 (1981). (holding that although Federal Rule of Civil Procedure 69 provides for execution of judgment according to the "practice or procedure" of the state in which the district court is held, federal, not state, statutory exemptions govern.)

The proscription in 23 U.S.C. § 409 is "shall not be admitted into evidence . . . or considered for other purposes . . .." The meaning of "shall not be admitted into evidence . . .." is abundantly clear. We need look no further to discern Congress' intent. *American Trucking Associations, Inc. v. Interstate Commerce Commission*, 659 F.2d 452, 459 (5th Cir. 1981).

The meaning of "or considered for other purposes . . ." is not clear. There is a presumption that the legislature intended the plain meaning of the words it chose. *Louisiana*

ex rel Guste v. United States, 656 F. Supp. 1310, 1315 (W.D. La. 1986). The indended effect of this phrase, however, is not self-evident. The documents made inadmissible by 23 U.S.C. §409 are not "all information gathered . . ." as the trial court held, but rather "reports, surveys, schedules, lists or data compiled . . .." This enumeration suggests something more than simple factual information that DOTD has gathered. These documents may reflect mental impressions, conclusions, and opinions of DOTD representatives regarding a survey of railroad grade crossings in need of "separation, relocation, or protective devices . . . ," if compiled in compliance with 23 U.S.C. § 130; or mental impressions, conclusions, and opinions of DOTD representatives regarding "hazardous locations, sections, and elements . . . [to be assigned] priorities for the correction of such . . . and [for the implementation of] a schedule of projects for their "improvement," is compiled in compliance with 23 U.S.C. § 152. This is similar to the kind of documentary evidence assembled by expert witnesses that is not subject to discovery under Rule 26 of the Federal Rules of Civil Procedure or under our Code of Civil Procedure.[5] Fed. R. Civ. Pro. 26; *See also* LSA-C.C.P. art. 1424; *Louisiana Department of Transportation and Development v. Stumpf*, 458 So.2d 448 (La. 1984).

The phrase "considered for other purposes . . .," preceded by language referring to admissibility of evidence, implies a finder of fact. A finder of fact *considers* testimony and documentary evidence. We believe that the catch-all phrase was meant to include *any other trial use* of the enumerated documents; that is to say, that for purposes of the finder of fact, the documents prohibited by 23 U.S.C. §409

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5. Louisiana's rules of discovery are, in fact patterned after and do not substantially differ from the federal rules. *Ogea v. Jacobs*, 344 So.2d 953, 957 (La. 1977).

do not exist. They may not be referred to by counsel, and they may not be used for impeachment purposes. They are, however, discoverable, if not otherwise prohibited by LSA-C.C.P. art. 1422, which specifically provides that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[6]

We say this mindful that privileges are the exceptions to and in derogation of the system by which we determine the truth, and cannot be lightly created or expansively construed. *United States v. Nixon*, 94 S.Ct. 3090 (1974). We are additionally aware of the fundamental objectives of Louisiana's discovery process and the liberal construction that articles 1421 through 1474 of the Code of Civil Procedure are to be afforded in order to attain these objectives. *Hodges v. Southern Farm Bureau Casualty Insurance Company*, 433 So.2d 125 (La. 1983). The reports, surveys, data, schedules, and lists collected pursuant to 23 U.S.C. §§ 130, 144, and 152, made inadmissible by 23 U.S.C. § 409, are not privileged within the meaning of LSA-C.C.P. art. 1422, and 23 U.S.C. § 409 does not displace our Code of Civil Procedure so as to make them privileged.

Our interpretation of the scope of 23 U.S.C. § 409 is analogous to interpretation by the Eighth Circuit of a Nebraska statute requiring the county coroners to submit a report to the state Department of Motor Vehicles where a driver of a vehicle dies within four hours of a motor vehicle accident. Neb. Rev. Stat. §§ 39-6, 104.07; *Blackledge v. Martin*

6. The documents are *inadmissible* by operation of 23 U.S.C. § 409; therefore, it is incumbent upon the parties seeking to discover them to show that the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

K. Eby Construction Company, Inc., 542 F.2d 474, 475 (8th Cir. 1976). The statute required the coroner, in such an instance, to test for and determine the percentage of alcohol in the body of the deceased. *Id.* A related statute provided that neither the report submitted by the coroner nor any statement contained therein "shall be made available for any purpose in any trial arising out of the accident . . .." Neb. Rev. Stat. §§ 39-6, 104.10; *Blackledge*, 542 F.2d at 476. The court concluded that, in the facts before it, evidence of a motor vehicle accident victim's blood alcohol content was admissible notwithstanding the exclusionary statute because the examination had been made in the "ordinary course of an autopsy ordered by the acting Coroner of Douglas County and not for purposes of any report to be submitted to the Department of Motor Venicles." *Id.* We suggest this distinction, by analogy, is appropriate in determining the ambit of 23 U.S.C. § 409.

Finally, we address the retroactive application of 23 U.S.C. § 409. The statute was added to Title 23 by Pub. L. No. 100-17, 100 Stat 170 (1987). The collision occurred in 1980. The suits were filed in 1981 and 1982, respectively.

Bradley v. School Board of Richmond, 94 S.Ct. 2006 (1974), requires retroactive application of a change in the law in the absence of legislative mandate to the contrary or unless such application would cause manifest injustice. *LTV Federal Credit Union v. UMIC Government Securities*, 704 F.2d 199, 202 (5th Cir. 1983); *see also Cort v. Ash*, 95 S.Ct. 2080, 2087 (1975). There is no congressional mandate that 23 U.S.C. § 409 apply prospectively only. Under the construction we give 23 U.S.C. § 409, private litigants will be deprived of certain evidence but not a cause of action. *Cf. California Cartage Company, Inc. v. United States*, 802 F.2d 353 (9th Cir. 1986) (where retroactive application of a statute deprived litigants of standing to sue). We do not

accept the contention that applicants will now be unable to prove DOTD's knowledge of a defective condition, if such is the case. In this regard, the right to introduce these documents into evidence, if it be a right, is not one that has become unconditional such that deprivation of this evidence will work manifest injustice on the litigants. *LTV Federal Credit Union*, 704 F.2d at 203. Moreover, the value of the right to introduce this evidence at trial is contingent upon a variety of other contingencies–the outcome of all of which is uncertain. *See California Cartage*, 802 F.2d at 357. We conclude that manifest injustice will not result from the retroactive application of 23 U.S.C. § 409. *See also Anderson v. Anderson*, 520 So.2d 1236 (La. App. 5th Cir.), *writ denied*, 521 So.2d 1187 (La.1988) (citing *Bradley*, 94 S.Ct. 2006, to support the retroactive application of 10 U.S.C. § 1408, the "Federal Uniformed Services Former Spouse Protection Act," so as to allow state courts to consider military pension benefits when determining property rights between parties to a divorce).

For the reasons set forth above, we give 23 U.S.C. § 409 restrictive interpretation. The documents prohibited by § 409 do not exist for the fact finder, and relators in pursuing pretrial discovery are permitted a scope of discovery limited only by the statutory language of LSA-C.C.P. arts. 1422-1425.

All costs of these applications, amounting to $8,254.75,[7] are taxed to DOTD. Attorney fees for Martinolich's and Southern Pacific's counsel are fixed at $2,000.00 each.

INTERLOCUTORY RULING VACATED, AND WRIT MADE ABSOLUTE.

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7. Costs of suit number 88 CW 0159 are $6,967.69, and costs of suit number 88 CW 0327 are $1,287.06.

EXHIBIT D

SUPREME COURT
OF THE
STATE OF LOUISIANA

DOCKET NO.

NICK MARTINOLICH

VERSUS

SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ET AL

CONSOLIDATED WITH

SOUTHERN PACIFIC
TRANSPORTATION COMPANY

VERSUS

NICK MARTINOLICH, ET AL

OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI, OR REVIEW, ON BEHALF OF AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, NICK MARTINOLICH and/or NICK MARTINOLICH, INC., and RUSSELL C. BENOIT, II FROM THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF LAFOURCHE

CIVIL PROCEEDING

Respectfully Submitted,

HAILEY, McNAMARA, HALL,
LARMANN & PAPALE

BY: s/s C. Kelly Lightfoot
C. KELLY LIGHTFOOT
Suite 1400, One Galleria Boulevard
P. O. Box 8288
Metairie, Louisiana 70001-8288
Telephone: (504) 836-6500
Appeal Counsel for American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russell Benoit, II

The above captioned matter is brought before this Honorable Court on a writ of certiorari, or review, by the State of Louisiana through the Department of Transportation and Development. The writ application has been brought by the Department of Transportation and Development in response to the Judgment of the First Circuit Court of Appeal rendered on October 12, 1988. The issue before the Trial Court, Court of Appeal, and this Honorable Court, involves the interpretation of 23 U.S.C. Section 409 which provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planing the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossing, pursuant to Sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing federal-aid highway funds shall not be admitted into evidence in Federal or State Court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

Counsel for American Mutual Liability Insurance Company, the Martinolich interests, and Russell Benoit, II submit that the First Circuit Court of Appeal correctly determined that the trial court clearly erred in finding that 23 U.S.C. Section 409 created a privilege which made all information collected non-discoverable. The Court of Appeal issued an eleven page opinion which fully addresses the issues of construction, interpretation and application of the federal statute in question. As pointed out by the Court of Appeal,

"the documents made inadmissible by 23 U.S.C. Section 409 are not 'all information gathered . . .' as the trial court held, but rather 'reports, surveys, schedules, lists or data compiled . . .' ". As urged in the original brief filed on behalf of American Mutual Liability Insurance Company, the Martinolich interests, and Russell Benoit, II with the First Circuit Court of Appeal, 23 U.S.C. Section 409 clearly and unambiguously deals with the admissibility of documentary evidence. The statute in no way limits testimony or discovery regarding the identity, evaluation or actions taken regarding planing the safety enhancement of potential accident sites. Nowhere in the statute is the word "privileged" used and nowhere in this statute is there any suggestion that the reports and surveys discussed in the statute are not discoverable.

The State of Louisiana, through the Department of Transportation and Development, continues to suggest that American Mutual Liability Insurance Company, the Martinolich interests, and Russell Benoit, II are attempting to discover the activities taken by the Department of Transportation and Development subsequent to the accident of November 1, 1980 in order to establish that a hazardous and negligent condition existed on the date of the accident. As was pointed out in the brief filed with the Court of Appeal, American Mutual Liability Insurance Company, the Martinolich interests, and Russell Benoit, II are only trying to identify what actions were taken by the Department of Transportation and Development *prior to* the accident of November 1, 1980 in order to establish that the Department of Transportation and Development had prior knowledge that this was a dangerous crossing in need of additional warning signals and/or devices, but failed to provide same. Further, American Mutual Liability Insurance Company, the Martinolich interests, and Russell Benoit, II are not trying to establish what actions were taken by the Department of Transportation and

Development prior to the accident in order to prove that a negligent or hazardous condition existed because these actions were taken by the Department of Transportation and Development, rather, the information is being sought to establish that the Department of Transportation and Development was negligent in its procedure for evaluating railway-highway crossing and, therefore, this particular crossing failed to receive the proper additional warning signals, devices, etc., when it should have.

IT IS FURTHER SUBMITTED that the Court of Appeal correctly found that "the reports, surveys, data, schedules, and lists collected pursuant to the 23 U.S.C. Section 130, 144, and 152, made inadmissible by 23 U.S.C. Section 409, are not privileged within the meaning of LSA-C.C.P. Art. 1422, and 23 U.S.C. Section 409 does not displace our Code of Civil Procedure as to make them privileged." It is submitted that the discovery of the information in the possession of the Department of Transportation and Development with regard to this particular crossing is reasonably calculated to lead to the discovery of information which will establish that the Department of Transportation and Development was negligent in its evaluation of this particular crossing which information will be admissible. Therefore, It is submitted that the discovery sought by American Mutual Liability Insurance Company, the Martinolich interests, and Russell Benoit, II is reasonably calculated to lead to the discovery of admissible evidence.

WHEREFORE, American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc. and Russell Benoit, II pray that the application of the State of Louisiana through the Department of Transportation and Development for certiorari, or review, be denied and that the judgment of the First Circuit Court of Appeal be affirmed.

Respectfully Submitted,

HAILEY, McNAMARA, HALL, LARMANN & PAPALE

BY: s/s C. Kelly Lightfoot
C. KELLY LIGHTFOOT
Suite 1400, One Galleria Boulevard
P. O. Box 8288
Metairie, Louisiana 70001-8288
Telephone: (504) 836-6500
Appeal Counsel for American Mutual Liability Insurance Company, Nick Martinolich and/or Nick Martinolich, Inc., and Russell Benoit, II

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 22 day of November, 1988, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed and first class postage prepaid.

s/s C. Kelly Lightfoot

EXHIBIT E

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 88-C-2769

NICK MARTINOLICH
VS
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
et al

C/W

SOUTHERN PACIFIC TRANSPORTATION COMPANY
VS
NICK MARTINOLICH, et al

IN RE: Transportation & Dev. Dept. of: - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CW88 0159, CW88 0327; Parish of Lafourche 17th Judicial District Court Div. "C" Number 44698, 46788

January 6, 1989

Denied.

LFC
PFC
JLD
JCW

MARCUS & LEMMON, JJ., would grant the writ.

Supreme Court of Louisiana
January 6, 1989

s/s Francis J. Labranch, Jr.
Clerk of Court
For the Court